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No. 84-433.

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS,
PETITIONERS,
v.
DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO A/K/A JOHN DOE, SR., AS HE IS NEXT FRIEND OF MICHAEL PANICO A/K/A JOHN DOE, JR.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Petitioners.

CORRECTED COPY

DAVID BERMAN,
Counsel of Record,
JANE KENWORTHY LEWIS,
BERMAN AND MOREN,
100 George P. Hassett Drive,
Medford, Massachusetts 02155-3297.
(617) 395-7520
Attorneys for the Petitioners

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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Questions Presented.

I. May a United States District Court award damages to the parents of a handicapped child on the grounds that a local educational agency has neglected to prepare an adequate IEP or has in the past committed procedural and substantive violations of EHA law, or cognate state law, or on the ground that it would be equitable to award such damages?

II. If the answer to the foregoing question is affirmative, was this an appropriate case for the award of such damages?

III. Do the provisions of 20 U.S.C. § 1415(e)(3), generally or on the facts of this case, bar relief to parents who reject an IEP and without agreement by local or state authorities place a child in a private school while administrative proceedings are pending?

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Brief for Petitioners.

Citations to Opinions Below.

The following opinions are reprinted in the record-appendix of the Petition for Writ of Certiorari. They are unreported unless otherwise noted.

1. Decision of the Bureau of Special Education Appeals of the Department of Education of the Commonwealth of Massachusetts dated January 31, 1980.

2. Opinion of the United States District Court for the District of Massachusetts, Zobel, J., dated November 19, 1980.

3. Opinion of the United States Court of Appeals for the First Circuit dated June 18, 1981 and reported at 655 F.2d 428 (1st Cir. 1981).

4. Pre-trial Order of the United States District Court for the District of Massachusetts, Zobel, J., dated March 18, 1982.

5. Memorandum of Decision of the United States District Court for the District of Massachusetts, Zobel, J., dated August 13, 1982.

6. Opinion of the United States District Court for the District of Massachusetts, Aldrich, J., dated March 7, 1983 and reported at 561 F.Supp. 121 (D. Mass. 1983).

7. Opinion of the United States Court of Appeals for the First Circuit dated May 29, 1984 and reported at 736 F.2d 773 (1st Cir. 1984).

8. Judgment of the United States Court of Appeals for the First Circuit, entered May 29, 1984.

9. Order of the United States Court of Appeals for the First Circuit denying a motion for rehearing dated June 29, 1984.

The following opinions are reprinted in the Joint Appendix.

1. Memorandum and Order of the Court of Appeals for the First Circuit, entered January 28, 1981.

2. Order of the United States District Court for the District of Massachusetts, Zobel, J., dated February 12, 1981.

3. Judgment of the United States District Court for the District of Massachusetts, Zobel, J., dated May 9, 1983.

4. Order of the United States Supreme Court granting certiorari, December 3, 1984.

Jurisdiction.

On May 29, 1984 the United States Court of Appeals for the First Circuit entered judgment affirming in part and

reversing in part a judgment of the United States District Court for the District of Massachusetts. Plaintiffs were given until June 18, 1984 to file a petition for rehearing and filed a petition for rehearing on that date. On June 29, 1984 the petition for rehearing was denied. On September 18, 1984 a petition for writ of certiorari was filed and, on December 3, 1984, was granted, limited to questions I and V. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutory Citations.

CONSTITUTION OF THE UNITED STATES.

AMENDMENT XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

UNITED STATES STATUTES.

UNITED STATES CODE, TITLE 5.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Education of the Handicapped Act".

(b) Findings

The Congress finds that—

(1) there are more than eight million handicapped children in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

(8) State and local educational agencies have a responsibility to provide education for all handicapped children,

but present financial resources are inadequate to meet the special educational needs of handicapped children; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in section 1412(2) (B) of this title a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

§ 1417. Administration

(a) Duties of Secretary

(1) In carrying out his duties under this subchapter, the Secretary shall—

(A) cooperate with, and furnish all technical assistance necessary, directly or by grant or contract, to the States in matters relating to the education of handicapped children and the execution of the provisions of this subchapter;

(B) provide such short-term training programs and institutes as are necessary;

(C) disseminate information, and otherwise promote the education of all handicapped children within the States; and

(D) assure that each State shall, within one year after November 29, 1975, provide certification of the actual number of handicapped children receiving special education and related services in such State.

(2) As soon as practicable after November 29, 1975, the Secretary shall, by regulation, prescribe a uniform financial report to be utilized by State educational agencies in submitting State plans under this subchapter in order to assure equity among the States.

(b) Rules and regulations

In carrying out the provisions of this subchapter, the Secretary shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

(c) Protection of rights and privacy of parents and students

The Secretary shall take appropriate action, in accordance with the provisions of section 1232g of this title, to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by State and local educational agencies pursuant to the provisions of this subchapter.

(d) Hiring of qualified personnel

The Secretary is authorized to hire qualified personnel necessary to conduct data collection and evaluation activities required by subsections (b), (c) and (d) of section 1418 of this title and to carry out his duties under subsection (a)(1) of this section without regard to the provisions of Title 5 relating to appointments in the competitive service and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and general schedule pay rates except that no more than twenty such personnel shall be employed at any time.

§ 1418. Evaluation

(a) Duties of Secretary

The Secretary shall directly or by grant, contract, or cooperative agreement, collect data and conduct studies, investigations, and evaluations—

(1) to assess progress in the implementation of this chapter, the impact, and the effectiveness of State and local efforts to provide free appropriate public education to all handicapped children and youth; and

(2) to provide Congress with information relevant to policymaking and provide Federal, State, and local educational agencies with information relevant to program management, administration, and effectiveness with respect to such education.

(b) Collection of data on education of handicapped children and youth; additional information

In carrying out the responsibilities under this section, the Secretary, on at least an annual basis, shall obtain data concerning programs and projects assisted under this chapter, and under other Federal laws relating to the education of handicapped children and youth, and such additional information, from State and local educational agencies and other appropriate sources, as is necessary for the implementation of this chapter including—

(1) the number of handicapped children and youth in each State receiving a free appropriate public education (special education and related services) by disability category and by age group (3-5, 6-11, 12-17, and 18-21);

(2) the number of handicapped children and youth in each State who are participating in regular educational programs, by disability category (consistent with the requirements of section 1412(5)(B) of this title and section 1414(a)(1)(C)(iv) of this title), and the number of handicapped children and youth in separate classes, separate schools or facilities, or public or private residential facilities, or who have been otherwise removed from the regular education environment;

(3) the number of handicapped children and youth exiting the educational system each year through program completion or otherwise, by disability category and age, and anticipated services for the next year;

(4) the amount of Federal, State, and local funds expended in each State specifically for special education and related services (which may be based upon a sampling of data from State agencies including State and local educational agencies);

(5) the number and type of personnel that are employed in the provision of special education and related services to handicapped children and youth by disability category served, and the estimated number and type of additional personnel by disability category needed to adequately carry out the policy established by this chapter; and

(6) a description of the special education and related services needed to fully implement the chapter throughout each State, including estimates of the number of handicapped children and youth within each disability by age group (3-5, 6-11, 12-17, and 18-21) in need of improved services and the type of programs and services in need of improvement.

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(e) Specifically mandated studies

(1) At least one study shall be a longitudinal study of a sample of handicapped students, encompassing the full range of handicapping conditions, examining their educational progress while in special education and their occupational, educational, and independent living status after graduating from secondary school or otherwise leaving special education.

(2) At least one study shall focus on obtaining and compiling current information available through State educational agencies and local educational agencies and other service providers, regarding State and local expenditures for educational services for handicapped students (including special education and related services), and gather information needed in order to calculate a range of per pupil expenditures by handicapping condition.

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§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

. . . . . .

FEDERAL REGULATIONS.

34 Code of Federal Regulations.

§ 300.512 Timeliness and convenience of hearings and reviews.

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

. . . . . .

The following are found in the statutory appendix to the petition for certiorari:

Constitution of the United States, Art. VI, Supremacy Clause.

United States Statutes: 20 U.S.C. § 1401, 20 U.S.C. § 1411, 20 U.S.C. § 1412, 20 U.S.C. § 1414, 20 U.S.C. § 1415, 20 U.S.C. § 1416.

Federal Regulations: 34 C.F.R. §§ 300.121a, 300.126, 300.128-130, 300.300, 300.304, 300.343, 300.347, 300.403, 300.452, 300.501, 300.503, 300.504, 300.530-534, 300.540-543, 300.550-554.

Federal Rules of Appellate Procedure: Rule 3(c).

State Statutes: Mass. G.L. c. 71B, § 10.

State Regulations: 603 C.M.R. 311, 327.1, 327.2, 330-333, 335, 403, 409.

Statement of the Case.

Michael Panico has a learning disability (Pet. A. 15a).* Litigation between his parents, the Panicos, and petitioners, the Town of Burlington (Massachusetts) and its school committee, began in the summer of 1979 when Mr. Panico rejected (J.A. 18, Pet. A 59a-60a) an individual education plan (IEP) drawn up by local school authorities (J.A.7 to 23), placed Michael in the Carroll School (a private school for children with learning disabilities) (Pet. A. 3a), and asked the Bureau of Special Education of the Department of Education of the Commonwealth of Massachusetts (the Department) to validate the rejection and the private school placement (J.A. 28).

The Department designated a hearing officer who held hearings in September, October and November of 1979 (R.A. Vols. III and IV). On January 31, 1980, she rendered a decision that approved the placement of Michael in the Carroll School (Pet. A. 13a-14a, 23a-24a). Petitioners brought an action in the United States District Court for the District of Massachusetts to have the decision set aside (J.A. 175). After several skirmishes on preliminary issues of procedure and sub-

* The following abbreviations to various appendices are used. Appendix to the Petition for Writ of Certiorari: Pet. A.; Record Appendix (in four bound volumes as submitted to the First Circuit Court of Appeals): R.A.; Joint Appendix to this Brief: J.A.

stance,[1] three of which were ruled on by the Court of Appeals for the First Circuit, see *Town of Burlington* v. *Department of Education (I)*, 655 F.2d 428 (1st Cir. 1981) (Pet. A. 36a), the District Court tried the case for four days in May of 1982 (R.A. Vol. II). In May of 1983, a judgment generally favorable to petitioners was entered[2] (J.A. 406). Respondents appealed. The First Circuit heard oral argument on November 8, 1983, and on May 29, 1984 a panel rendered an opinion, *Town of Burlington* v. *Department of Education (II)*, 736 F.2d 773 (1st Cir. 1984) (Pet. A. 87a), and judgment (Pet. A. 144a) generally unfavorable to petitioners.[3] Rehearing was sought and denied (Pet. A. 146a). This Court has granted certiorari (J.A. 408).

Michael entered kindergarten at petitioners' Memorial School in September of 1975 (Pet. A. 2a). At the end of the 1976-1977 school year his teacher thought that he was immature and recommended that he be considered for retention (J.A. 38, 57; R.A. IV, p. 326). His parents, however, apparently aware of the rights of handicapped children, insisted that he be given a core evaluation (J.A. 38-39; R.A. IV, p. 4) to determine whether he had a learning disability and, if so, the appropriate program of remediation. Although the parents were not informed that such an evaluation could include an independent medical assessment (J.A. 59), the evaluation, including the assessment (J.A. 380), was carried out (R.A. IV pp. 1-47).

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[1] Petitioners will focus on these preliminary skirmishes later in this statement to the extent necessary to illuminate the issue of reimbursement, in this case a euphemism for damages.

[2] The judgment declared that petitioners' IEP was adequate and appropriate and ordered respondent Panico to reimburse petitioners for sums expended for Michael's education at the Carroll School, see p. 20, *infra*, but set off sums received by petitioners from the Commonwealth of Massachusetts toward Michael's education (J.A. 407). On the limited basis of that set off, petitioners cross-appealed.

[3] The First Circuit ruled that the District Court had erred in not giving the hearing officer's decision due weight (Pet. A. 106a, 113a-120a) and not resolving supposedly conflicting diagnoses of Michael's underlying dyslexia (Pet. A. 119a-120a) and may have erred in receiving evidence (Pet. A. 113a-116a). It also found error in the allocation of the burden of proving proper placement for years subsequent to 1979-1980 (Pet. A. 121a-122a, 124a).

At its conclusion the parents asked that the decision on retention be deferred until fall, since Michael was to be privately tutored over the summer (J.A. 40, 61). An IEP was not drawn up because the assessments did not indicate any special needs (J.A. 198, 223-224; R.A. III, pp. 400-402).

In September of 1977 Michael entered the second grade at Memorial School. His progress, at least according to his parents, was unsatisfactory (J.A. 40, 63-64). In March of 1978 petitioners drew up an IEP (R.A. IV, pp. 337-341), approved by his parents, under which Michael remained at the Memorial School but spent some time each day in a reading clinic. The IEP was to remain in effect for one year.

On May 24, 1979, Michael, after missing recess and lunch because of routine testing that had been carried out by special education personnel at the Memorial School (R.A. IV, p. 129), exhibited symptoms of serious emotional disturbance at home (J.A. 89-90, 354-355; R.A. III, pp. 539-540). On May 25, 1979 Mr. Panico met with the Town Coordinator of Special Education and demanded an immediate new core evaluation (J.A. 323), notice for which was drawn up at once (R.A. IV p. 138). A team was convened and found that Michael suffered from serious reading disabilities (J.A. 202-203, 206; R.A. IV, pp. 138-140). After that meeting on June 4, 1979, in which the parents participated, an IEP was drawn up for the 1979-1980 school year placing Michael in a special education classroom of the Pine Glen School, another public school of the Town (J.A. 7-23). He was to be taught by an experienced teacher, John McAleer (Pet. A. 63a; J.A. 225, 243-244, 254, 287). The IEP provided that Michael would be able to take lunch, recess, music, art and gym with non-handicapped children (Pet. A. 62a) and it was contemplated that he, as soon as possible, take mathematics with them as well (Pet. A. 16a; J.A. 210, 238). The focus of the plan was on reading and related skills (J.A. 7-14, 203, 206, 231-239, 270; Pet. A. 7a, 62a).

The parents rejected the IEP and without seeking or obtaining permission from local or state educational authorities enrolled Michael in the Carroll School, a private school in Lincoln,

Massachusetts, exclusively for children with learning disabilities (R.A. II p. 3-141).[4]

Petitioners' action in the District Court was commenced on February 26, 1980 (J.A. 175). The Complaint contained an application for a stay of the hearing officer's decision (J.A. 176). That application was denied on July 24, 1982, and petitioners appealed, treating the denial of the stay as the denial of a preliminary injunction. Michael remained in the Carroll School for the 1980-1981 (and 1981-1982) school year (J.A. 346). While petitioners' appeal was pending, in December of 1980, the Panicos suggested that they could no longer afford the tuition and related expenses for Michael at the Carroll School (Pet. A. 45a; D. Ct. Docket entry No. 128). Apparently under pressure from the Panicos, the Department of Education ordered petitioners to pay for Michael's education at the Carroll School. It threatened an immediate cut-off of federal funds, if petitioners did not comply (Pet. A. 40a, 71a, 84a-85a). Petitioners' response was to seek an order enjoining the Department from cutting off federal funds (D. Ct. Docket entries No. 131, 132 and 151). The Department of Education for its part had sought an injunction to enforce its decision requiring

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[4] Fully aware that petitioners were relying on 20 U.S.C. § 1415(e)(3) as a bar to any and all of their rights; respondents Panicos never at any time suggested to the District Court or the United States Court of Appeals that they had received actual permission from local or state authorities to withdraw Michael from the placement at Pine Glen and to place him in the Carroll School. The entire case was argued to both the District Court and the Court of Appeals, without objection on their part, on the theory that no such permission had been obtained. At the administrative hearing Mr. Panico submitted in written form, as well as orally, a chronology of Michael's progress through the Burlington school system. For the written chronology see J.A. 38-49; for the oral testimony see J.A. 50-174. He further testified at trial (J.A. 313-335, 336-390). At no time did he mention seeking permission from anyone to place Michael in the Carroll School. This is of particular import, since the written chronology deals in some detail with the events of the summer of 1979 between the time that the parents rejected the IEP on July 3, 1979 and the commencement of hearings on September 26, 1979 (J.A. 47-49). Mr. Panico also testified before the hearing officer to a conversation with the Burlington Superintendent of Schools on or about August 1, 1979, wherein Mr. Panico was told that if he wanted to pay the Carroll School, pay it; that was his choice (J.A. 163). In the circumstances, it is almost inconceivable that if Mr. Panico had asked permission from state or local authorities to enroll Michael in the Carroll School he would not have mentioned it explicitly.

petitioners to reimburse the Panicos for the tuition and related expenses from September of 1979 to January of 1981 (D. Ct. Docket entries No. 119, 121). Under this pressure, petitioners agreed to fund Michael's education at the Carroll School unless the Court of Appeals decided the application for a stay in their favor (Pet. A. 85a). The District Court on February 12, 1981 further ordered reimbursement of expenses from 1979 onward, and that order was appealed as well. The June 18, 1981 decision of the Court of Appeals (Pet. A. 36a) consolidated both the denial of the stay and the order of immediate reimbursement as well as a third order not immediately relevant (Pet. A. 41a). In essence, the court found that a stay was not necessary because petitioners had not shown any probability of immediate harm (Pet. A. 43a). The court made it clear that if petitioners were successful, the Panicos would have to repay the sums that the petitioners were now advancing (Pet. A. 45a). The court, however, vacated the order for immediate reimbursement (Pet. A. 47a). Again, it did so on the specific basis that no showing of irreparable harm had been made; the parents had not shown any need for reimbursement (Pet. A. 46a-47a).

Following the decision of the Court of Appeals, the District Court ordered the parties to file pre-trial memoranda and entered a pre-trial order on March 18, 1982 (Pet. A. 48a). The order stated that the hearing officer's decision would be given prima facie weight (Pet. A. 54a) and that petitioners would have the burden of showing that the rejected IEP would have afforded Michael an appropriate free public education (Pet. A. 56a). The court further ruled that for years after 1979-1980, for which no IEP had been prepared, the burden was on the parents to show that the placement in the Carroll School was appropriate (Pet. A. 56a). The court denied (Pet. A. 49a) petitioners' motion for summary judgment (J.A. 189) which was based on the provisions of § 1415(e)(3) and on the refusal of the Panicos in July of 1980 to make Michael and his school records available for a ten-month evaluation.

Petitioners' objectives at trial were to show that the IEP which the hearing officer had found to be adequate was one that they were prepared to implement; that education at the

Pine Glen School would have been, in terms of EHA objectives, superior to education at the Carroll School because of the opportunities at Pine Glen for Michael to participate in activities with non-handicapped children; and that the procedural irregularities found by the hearing officer either did not exist or were entirely trivial and had no bearing upon petitioners' ability to implement the plan. With respect to the placement for years subsequent to 1979-1980, petitioners' objective was to show that the parents had rejected the IEP for erroneous reasons and that placement in the Carroll School in those years could not be justified (Petitioners' post-trial Bf., pp. 1-11, 13-22, 23-30, 39-42. D. Ct. Docket entry No. 275).

The District Court's decision, which, as we have already noted, was generally favorable to petitioners, was entered on August 13, 1982 (Pet. A. 57a). Essentially, the District Court found that petitioners' 1979-1980 IEP, rejected by the parents, offered Michael a free appropriate education (Pet. A. 62a-63a). At the Carroll School, where Michael at the time of trial had been enrolled for the past three years, he was being taught by the Orton-Gillingham method which emphasizes "strong phonetic training" (Pet. A. 61a). At the Pine Glen School he would have been taught with Helen Grush materials, "closely related to Orton-Gillingham, yet more flexible" (Pet. A. 61a). Petitioners' expert preferred this method of teaching Michael and the court concurred (Pet. A. 61a). As the court noted (Pet. A. 61a):

> Michael had been taught according to the Orton-Gillingham method during the 1978-1979 school year. He had mastered phonics, but was unable to become fluent. Moreover, his progress at the Carroll School, although good, did not significantly narrow the gap between his reading ability and the level of ability appropriate to his age.

The objectives and methods set forth in the 1979-1980 IEP were fully appropriate and "reasonably calculated to enable Michael to receive educational benefits" (Pet. A. 62a). Moreover, because of Mr. McAleer's experience and the small highly structured class in which Michael would have been

taught, petitioners were fully able to implement the IEP (Pet. A. 63a). The parents had not met their burden of proof with respect to the continued placement in the Carroll School after 1979-1980 (Pet. A. 66a).

The memorandum of decision of August 13, 1982 (Pet. A. 57a) did not result in an immediate judgment. Respondent parents moved for a new trial on September 9, 1982; their motion was denied on September 30, 1982. The parties disagreed over the amount that the Panicos should repay petitioners, who had been funding Michael's education at the Carroll School from February of 1981 through June of 1982. Petitioners argued that all sums paid should be repaid *in toto*. Respondents took the view that the Panicos should repay nothing or, at most, only the difference, if any, between the average cost of educating a handicapped child in petitioners' public schools and the cost of educating Michael in the Carroll School (Pet. A. 86a; see J.A. 404). On issues of reimbursement the case was consolidated with several EHA cases pending in the District Court and sent to Senior Circuit Judge Aldrich for determination (Pet. A. 69a). Judge Aldrich ruled that the Panicos were required to repay the amounts that they had received from petitioners, but could deduct from the repayments the amounts that petitioners had recovered from the Commonwealth toward Michael's education (Pet. A. 86a). Judgment entered on May 10, 1983, in accordance with the memoranda of Judges Zobel and Aldrich (J.A. 406). Petitioners have received no money from the Panicos pursuant to the District Court judgment: under its terms they are entitled to $8449.00.

Summary of Argument.

Among the issues faced by the First Circuit were whether respondent parents were entitled to keep sums that petitioners paid to them in connection with their son's private school education from January, 1981 to the end of the 1981-1982 school year and whether they were entitled to receive additional

sums to cover other periods (p. 20). Addressing the District Court's finding that petitioners' IEP was fully appropriate, the First Circuit found that finding possibly erroneous in light of the District Court's failure to choose between supposedly conflicting diagnoses; but the District Court was plainly right in finding that the supposed conflicts were insignificant and, more important, there was no evidence that the difference in diagnoses would have affected the child's placement (pp. 20-21).

The First Circuit also ruled that the District Court ought to have decided whether certain "violations" found by the hearing officer to have occurred between 1977 and 1979 were serious, and if they were, to award reimbursement, *i.e.*, damages based on them, but if they were not the parents would still be entitled, absolutely, to damages from the date of the hearing officer's decision to the end of the 1979-1980 school year and, conceivably, on the basis of "equitable" considerations, for other periods as well (pp. 21-22).

That Congress did not intend damages to be awarded under EHA is evidenced by its conferring concurrent jurisdiction over EHA claims on the Federal court, knowing that some of these claims would be directly against a State having Eleventh Amendment immunity (p. 23), its provision for financial sanctions against State and local school districts that do not comply with EHA law (pp. 23-24), and its enactment of § 1415(e)(3) requiring that placement not be changed while administrative and judicial proceedings relating to an IEP are pending (p. 24). Also, allowing damages under EHA tends to derogate from the central purpose of EHA, which is the preparation of an appropriate IEP (pp. 24-25). The courts of appeals have generally held that damages cannot be recovered under EHA law, and that conclusion is foreshadowed by this Court's statements in *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1 (1981) (pp. 25-26).

None of the circumstances pointed out by the First Circuit take this case out of the general rule that damages are not to be awarded under EHA (pp. 26-36). The parents presented no evidence of having relied on the hearing officer's decision to keep Michael in the Carroll School from the date of the hearing

officer's decision, and such reliance is highly unlikely in the face of the evidence (pp. 26-27). The change in placement violated Federal law, upon which no one can rely on a right to violate (pp. 27-28). In any event, there can be no recognizable "reliance" upon a decision subject to appeal and promptly appealed (p. 28).

Upon the facts of this case damages resulting from the failure to draw an adequate IEP are inappropriate and highly unlikely (pp. 28-29). Damages on the so-called procedural violations should not be awarded because Michael suffered no injury therefrom (p. 29) and because the violations are facially trivial (pp. 29-32). The First Circuit's error in allowing such damages stems from improperly equating procedural violations with "bad faith" (p. 32). Even serious procedural violations may be no more than honest mistakes, and no point is served by punishing them (pp. 32-33).

EHA damages cannot, contrary to the First Circuit's opinion, be awarded on an "equitable" basis (pp. 33-35). The sole "equitable" basis for damages specifically noted by the First Circuit is, on analysis, no basis at all, and no other basis seems to exist (pp. 33-34). Even if it did, however, the notion of an "equitable" right to damages flies in the face of accepted equity jurisprudence (p. 34). Allowing the parents to keep moneys that they received from petitioners is the same as awarding them damages, and calling the repayment required by the District Court "reimbursement" to make it subject to "equitable" considerations is merely a labelling change (pp. 34-35).

The First Circuit also erred in holding that damages could be awarded for a school year as to which no IEP had been drawn since, otherwise, the whole administrative machinery of EHA is bypassed (pp. 35-36). Since the parents actively frustrated the drawing of an IEP for subsequent years, this is a particularly weak case for damages for those years (p. 36).

By implication borne out by the legislative history of EHA Congress has shown a nonabsolute preference for public school education of handicapped children, whereas parents, for reasons about which one can only speculate and which do not

appear to be related to superiority of education often prefer private education; this has created an often repeated conflict in EHA law (pp. 37-40 and 53 *et seq.*). Congress has, however, mandated in § 1415(e)(3) that a child's placement shall not be changed while proceedings under § 1415 are pending, and several courts have, contrary to the position taken by the First Circuit in this case, ruled that parents who unilaterally change the placement forfeit their right to EHA relief (p. 41).

For purposes of EHA law and this case, the placement that the parents ought not to have changed without permission was the June, 1979 placement in Pine Glen scheduled to commence in September, 1979 (pp. 41-43). In the context of EHA, that the parents prevailed at the State administrative level did not constitute permission to change the placement (pp. 43-45).

Thus, this case squarely raises the issue of how § 1415(e)(3) should be construed (p. 45). The First Circuit considered the language of (e)(3) directory rather than mandatory, relying in part on the legislative history of EHA, but its reliance on the legislative history was misplaced (pp. 45-46). Courts that have construed (e)(3) as mandatory have correctly concluded that the statutory language is clear and that any other construction is contrary to the purposes of EHA and may play havoc with the public fisc (p. 46).

Congress may have enacted (e)(3) for several cogent reasons (pp. 46-47). The reasons advanced by the First Circuit for reading qualifications and exceptions into (e)(3) do not stand up to close scrutiny (pp. 47-48). There is no reason to believe in the present case that enrollment in Pine Glen would have caused irreparable injury to the child (pp. 48-49), but if a child is suffering irreparable injury because of delay in the administrative process, the appropriate response is not to read such injury as creating an exception to (e)(3) but to invoke the jurisdiction of the courts (pp. 49-51). The second exception read into (e)(3) by the First Circuit, based on bad faith, is without basis in this case; bad faith is not proven by the existence of violations, serious or not, but exists where an IEP, valid on paper, is a sham (pp. 51-52). In such a case, however, the child will suffer irreparable injury, and immediate resort to the courts as well as the sanctions against State and school districts found in EHA are appropriate (p. 52).

Argument.

I. The Court Below Incorrectly Ruled that Damages Can be Awarded Under EHA.

Although it is less than clear from the First Circuit's May, 1984 opinion, as the Statement of the Case indicates, one serious issue facing both the District Court and the Court of Appeals was whether the parents would be reimbursed for tuition and related expenses incurred in educating Michael at the Carroll School between September of 1979 and January of 1981 and would be permitted to keep the sums advanced by petitioners under protest between February of 1981 and the end of the 1981-1982 school year. The District Court, having found that petitioners' 1979 IEP was appropriate and that respondents had not met their burden of showing that the Carroll School was an appropriate placement for subsequent years (Pet. A. 66a), ordered the Panicos to return all sums received by them (with the already noted exception of certain funds paid to petitioners by the Commonwealth) and awarded them no further damages (J.A. 406). On appeal to the First Circuit, respondents argued, *inter alia*, that even if the finding was correct, the Panicos should not have been required to repay petitioners (Brief for Parents, pp. 36-39; Brief for Dept. of Ed., pp. 26-28, 28-35).

The route by which the First Circuit approached the issue of damages was convoluted. It attempted to criticize the finding that the 1979 IEP was appropriate and would have been implemented by petitioners if Michael had not been placed in the Carroll School (Pet. A. 118a-119a). Supposedly, the District Court in the face of conflicting diagnoses had not stated which diagnosis it accepted: how then could it have decided that petitioners' IEP was appropriate? The court below held that the District Court should go back and choose a diagnosis (Pet. A. 119a-120a, 139a). It must have recognized, however, that this criticism of the District Court's decision was window-dressing. For one thing, the District Court had carefully explained that the differences in the diagnoses needed no resolution as they were no more than a matter of emphasis where there was substantial agreement

as to the manner of treatment (Pet. A. 61a). Its statement is fully borne out of the record.[5]

More important, there was not the slightest hint in the voluminous evidence received by the District Court that the differences in diagnoses would have made a difference in placement. See *Anderson* v. *Thompson*, 658 F.2d 1205, 1208 (7th Cir. 1981). The First Circuit simply had no basis to expect that a finding supporting one diagnosis over another, even if it was the diagnosis of the parents' expert,[6] would change the outcome and, thus, affect any right of the parents to damages.

The Court, therefore, mounted a far more prolonged attack on the District Court's decision. This attack centered on the District Court's failure to deal with certain violations of procedural rights found by the hearing officer to have occurred between 1977 and 1979 (Pet. A. 106a-112a). The District Court, it was ruled, should have decided whether these violations were in fact serious (Pet. A. 138a).[7] If they were, the Panicos were to be awarded damages in the amount of 1979-1980 tuition and related Carroll School expenses regardless of the adequacy of petitioners' 1979 IEP and, in all likelihood,

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[5] See the testimony of Dr. Levine at R.A. II, pp. 3-99 to 3-103, 3-106 (visual processing); R.A. II, pp. 3-104 to 3-105, 3-107 (attention problems); R.A. II, pp. 3-108 to 3-109 (anxiety); R.A. II, pp. 3-99, 3-109 (neurological basis); R.A. II, 3-110, 3-115, 3-131 (appropriate treatment). Compare with the testimony of Dr. Kinsbourne at J.A. 271-272, 278-279 (visual sequencing, processing); J.A. 269, 271-274 (attention); J.A. 269-270 (anxiety, depression); J.A. 273 (neurological basis); J.A. 268-270, 279-283 (appropriate plan for treatment). See also Dr. Kinsbourne's testimony at J.A. 391-395 and 400.

[6] The District Court did indicate a mild preference for the testimony of petitioners' expert (Pet. A. 61a).

[7] In the District Court the Department of Education had downplayed the importance of these violations and neither the Panicos nor the State mentioned them in their post-trial briefs (D. Ct. Docket entries No. 273 and 274). Indeed, the Department in its brief in *Burlington I*, argued at length (Bf. 15-17) that the findings of the hearing officer concerning procedural violations were "not central to [the decision] so as to taint and invalidate it." The only evidence at trial concerning the violations was offered by petitioners' expert who found the violations pertaining to the 1979-1980 placement not to be serious (J.A. 292-293). When it became clear at trial that Michael's teachers at the Carroll School were for the most part less experienced than Mr. McAleer, the question of the superiority of education at Carroll School was more or less abandoned. In their brief to the Court of Appeals, respondents again began to emphasize the violations found by the hearing officer (Brief for Doe, pp. 14-16; Brief for Dept. of Ed., pp. 13-20).

would be entitled to have petitioners pay for tuition and related expenses at the Carroll School for years subsequent to 1979-1980 (Pet. A. 137a-138a). The Court reasoned, moreover, that even if the procedural violations were not serious and the 1979 IEP was appropriate, the Panicos would be absolutely entitled to an award of damages for tuition from the date of the hearing officer's decision to the end of the 1979-1980 school year (Pet. A. 136a-137a) and, on the basis of "equitable considerations, might be entitled to damages for tuition in other periods (Pet. A. 124a).

Thus, the Court of Appeals awarded damages* absolutely with respect to the period from January 30, 1980 to the end of the 1979-1980 school year; and left open the possibility that the parents would be awarded damages; (a) from September, 1979 onward if the IEP was found to be inappropriate (Pet. A. 124a) or if the procedural violations enumerated in the hearing officer's report were found to be serious (Pet. A. 135a-137a); or (b) from January, 1980 onward even if the IEP was found to be appropriate (Pet. 136a-137a) and the violations were found not to be serious (Pet. 136a), provided that an equitable basis for the award could be found (Pet. A. 131a-132a, 137a-138a).[9] Petitioners take the position that none of these awards was appropriate.

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* In their brief in opposition to certiorari, respondents attempted to distinguish between "reimbursement," *e.g.*, allowing the Panicos to keep funds advanced under protest or requiring petitioners to reimburse funds expended by the Panicos, and damages. The distinction is without substance. Out-of-pocket costs are a frequent element of damages in tort law, D. Dabbs, *Law of Remedies* 392 (1973); F. Harper and F. James, *The Law of Torts*, 1311-1312 (1956), and a no uncommon element of damages in contract law, §§ 2-710 and 2-715 of the Uniform Commercial Code (1957) and official comments thereto. If petitioners are ordered to pay money to the parents or the parents are excused from repaying money to petitioners, the parents have been awarded damages. See *Miener* v. *Missouri*, 673 F.2d 969, 982 (8th Cir. 1982) *cert. den.*, 103 S.Ct. 215 (1982).

[9] The reason for this anomalous result is that the parents only received money for expenses incurred from February, 1981 onward. The Court of Appeals applied the "equitable considerations" test only to the issue of whether the parents would have to repay the money that they received. It was apparently not troubled by the lack of connection between the 1978-1979 period in which the equitable basis for allowing the Panicos to keep the money supposedly might be found and the 1981-1982 period for which they received the money.

We begin by asking whether Congress intended a remedy in damages under any circumstances.[10] Perhaps the most obvious evidence that Congress intended no damages to be awarded under EHA is the provision of 20 U.S.C. § 1415(e)(2) conferring concurrent jurisdiction of the district court to hear EHA claims. Congress must have been aware that in some EHA cases the only viable defendant would be a State or State agency,[11] see *e.g.*, *Department of Education* v. *Katherine D.*, 727 F.2d 809 (9th Cir. 1983); *Stock* v. *Massachusetts Hospital School*, 392 Mass. 205 (1984); *Fallis* v. *Ambach*, 710 F.2d 49 (2d Cir. 1983); *Camenisch* v. *University of Texas*, 616 F.2d 127 (5th Cir. 1980) (decided under 29 U.S.C. § 794), and that the Eleventh Amendment bars actions for damages against a State in a Federal Court. *Edelman* v. *Jordan*, 415 U.S. 651, 662-667 (1974). The attempt to confer unconstitutional jurisdiction upon a court or to abrogate a State's immunity, is not lightly attributed to Congress. *Miener* v. *Missouri*, 673 F.2d at 981. As *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1916) reminds us, "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

Secondly, Congress provided for extensive monitoring of State and local compliance with EHA law, 20 U.S.C. §§ 1412, 1413, 1417-1418 and for serious financial sanctions for non-

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[10] The First Circuit looked at damages as authorized only by Federal law (Pet. A. 107a-109a), although it strongly indicated that at least in part the conduct that gave rise to damages in this case was violative of State law (Pet. A. 108a, 110a-112a). In a previous case, *Doe* v. *Anrig (I)*, 692 F.2d 800, 812-813 (1st Cir. 1982), since overruled, *Doe* v. *Anrig (II)*, 728 F.2d 30, 31 (1st Cir. 1984), the First Circuit concluded that damages were not available under Federal law but conceivably were available under Massachusetts law. *Doe* v. *Anrig I* was correct in concluding that damages were not available under Federal law but wrong in considering the issue of their availability under State law. *Pennhurst State School and Hospital* v. *Halderman*, 104 S.Ct. 900, 917-921 (1984); *Smith* v. *Robinson*, 104 S.Ct. 3457, 3464 n.6 (1984).

[11] In actions for breach of duties owed to handicapped children under EHA law, it would appear to be almost impossible to fix blame on any particular person or persons. The responsibilities for recognizing and remediating or attempting to remediate handicaps are necessarily diffuse. Thus, actions for damages will end up, in most if not all instances, being brought against a governmental body rather than individuals and in more than a few instances against a State itself.

compliance. 20 U.S.C. §§ 1414(b)(2) and 1416(a). Such sanctions make private actions for damages superfluous; if Congress had intended to permit EHA to be enforced through private actions for damages, the administrative monitoring and sanctions would not have been necessary. "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'" *TransAmerica Mortg. Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 20-21 (1979) quoting *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 289 (1929). As the Court stated in *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 28 (1981):

> In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.

Thirdly, though the provisions of § 1415(e)(3) are not the focus of the present argument,[12] by requiring that parents not change a child's placement unilaterally while administrative or judicial proceedings were pending, Congress effectively ruled out the possibility that parents could obtain damages for expenses incurred in making a change of placement before the proceedings had terminated.

Finally, awarding damages for infractions of EHA law tends to divert the attention of parents and school authorities alike from what is the central purpose of EHA: the drafting and implementation of IEP's that will provide a handicapped child an adequate future education. *Board of Education* v. *Rowley*, 458 U.S. 176, 181-182, 188-189 (1982). If damages are available, certain school districts may find it cheaper and more convenient to take the risk of paying them than to set up programs that will provide an adequate education in the least

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[12] But see Argument III, *infra*.

restrictive setting mandated by Congress, 20 U.S.C. § 1412(5)(C) and Federal regulations, 34 C.F.R. 300.550(b).[13] On the other hand, parents, if they believe that the law affords them damages, may well look for self-help solutions instead of cooperating with local and State authorities to find a suitable public school placement.[14] The District Court in this case correctly focused its attention on the merits of the rejected IEP (Pet. A. 62a-63a, 66a) rather than on past incidents (Pet. A. n. at 60a) and found the rejected IEP totally appropriate (Pet. A. 66a).

The lower courts have generally construed EHA as not creating a cause of action for damages. *Marvin H.* v. *Austin Independent School Dist.*, 714 F.2d 1348, 1356 (5th Cir. 1983); *Mountain View-Los Altos Union High School Dist.* v. *Sharron B.H.*, 709 F.2d 28, 30 (9th Cir. 1983); *Powell* v. *Defore*, 699 F.2d 1078, 1081 (11th Cir. 1983); *Miener* v. *Missouri*, 673 F.2d at 979. At one time the First Circuit took the same position. *Doe* v. *Anrig (I)*, 692 F.2d 800, 812 (1st Cir. 1982); *Colin K.* v. *Schmidt*, 715 F.2d 1, 10 (1st Cir. 1983). However, in *Doe* v. *Brookline School Committee*, 722 F.2d 910, 917, 919-920 (1st Cir. 1983) another panel of the First Circuit, not sitting en banc, compare *County of Monroe* v. *United States Dept. of Labor*, 690 F.2d 1359, 1363 (11th Cir. 1982), "overruled" *Doe* v. *Anrig (I)*.

In *Mountain View*, 709 F.2d at 30, the Court observed:

> Damage remedies for placement before full compliance with EAHCA [EHA] procedures are not in keeping with the design of the Act. A damage action is usually associated with the breach of some duty, or creation of an unusual risk as by engaging in an ultrahazardous activity. Damages serve not merely to compensate an injured party

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[13] It was stipulated in the present case that the average cost to petitioners of educating handicapped children was $6050.00 in 1979-1980, $6361.00 in 1980-1981, and $7069.00 in 1981-1982 (J.A. 404).

[14] In the present case, the parents declined an invitation to visit Mr. McAleer's class in the Pine Glen School before the close of the 1978-1979 school year (J.A. 119, 168-169, 376) and rejected the IEP, at least according to one version of their story, because they were under the impression that the class was for emotionally disturbed children (J.A. 127-128, 169, 332, 374). The impression was mistaken (J.A. 227) as even the hearing officer noted (Pet. A. 7a).

but also act as an incentive for potential defendants to act prudently. See, *e.g.*, 42 U.S.C. § 1983. Damages under EAHCA would serve no purpose. The prudent school district need not do more than faithfully apply the procedures of EAHCA. The threat of damages in a case like ours would not make compliance any more likely, and would subject school districts to contingent liabilities hardly foreseeable when the annual school budget is prepared.

Indeed, this Court's opinion in *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1 (1981), though decided under Title 42 U.S.C. §§ 6010, 6011, and 6063, pointed the way toward this holding since, as Justice Blackmun noted in his concurring opinion at p. 32, though the Court left "open for consideration on remand whether, and in what form, §§ 6011 and 6063 created rights that are enforceable by private parties," it strongly intimated that it would "not view kindly any future positive holding in that direction."[15] It would be difficult to distinguish between this case and *Pennhurst*. Both cases involve grants by Congress to the States to help alleviate the problems of a segment of society in need of assistance, and both involve certain directions to the States about how the grants will be used. Neither would seem intended to create any private or individual right to damages.

II. In Any Event None of the Circumstances Mentioned by the Court of Appeals Entitles the Parents to Damages.

A. *Reliance Upon the Hearing Officer's Decision.*

As we have already noted, the First Circuit ruled that the Panicos were absolutely entitled to be reimbursed for Michael's tuition and related expenses at the Carroll School from January 30, 1980, the date of the hearing officer's decision, to the end

[15] The question was still left open on *Pennhurst*'s second visit to this Court. 104 S.Ct. at 921 (1984).

of the 1979-1980 school year (Pet. A. 136a). It reasoned that the Panicos had a right to rely on the hearing officer's decision over that period, couching its ruling in the language of estoppel (Pet. A. 133a-136a).[16] The Panicos offered no evidence of such reliance. The usual rule is that where reliance is an element of a party's case, the burden is on that party to prove it.[17] See *e.g.*, *Pogue* v. *Retail Credit Co.*, 453 F.2d 336, 338 (4th Cir. 1972) *cert. den.*, 409 U.S. 1109 (1973). Not only did the parents offer no such proof at trial, but the evidence disproves any reliance on the hearing officer's decision as the basis for keeping Michael in the Carroll School over that period. The parents acted unilaterally in placing Michael in the Carroll School (J.A. 49, 119-120, 162-163; compare J.A. 359-362); they also kept him there for the next two years and declined any cooperation in petitioners' efforts at subsequent evaluations that could lead to a change in placement (J.A. 179-185).

Even if the parents had relied on the hearing officer's decision, their reliance was, as a matter of law, misplaced. They never received permission to change Michael's placement, and § 1415(e)(3) proscribed such a change while administrative or judicial proceedings were pending. See Argument III, *infra*. Petitioners brought their action in the District Court on February 26, 1981, less than thirty days after the hearing officer's decision was rendered. Reliance upon a right to violate Federal law, even where, unlike here, it is based upon the explicit

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[16] If by "estoppel," the Court meant to refer to the doctrine of equitable estoppel, such an argument would have bordered on the absurd. As Black's Law Dictionary, 648 (Revised 4th ed.) notes: "An estoppel arises when one is concluded and forbidden by law to speak against his own act or deed. *Gural* v. *Engle*, 128 N.J.L. 252, 25 A.2d 257, 261." At no time in this case have petitioners ever sought to speak against their own word or deed. If the reference was to estoppel by judgment (in this case, administrative decision), the short answer would be that no such estoppel operates with respect to a decision under review in the very proceeding in which review is sought. See *Maryland* v. *United States*, 381 U.S. 41, 53 n.38 (1965).

[17] The same is true of estoppel. *James Talcott, Inc.* v. *Associates Discount Corp.*, 302 F.2d 443, 446 (8th Cir. 1962) (Blackmun, J.).

advice of a Federal officer, is utterly unavailing.[18] *Schweiker* v. *Hansen*, 450 U.S. 785, 790 (1981).

Finally, reliance on a decision, administrative or judicial, that is subject to further review, especially review as of right, is never, even if proven, an adequate basis for awarding damages. Doubtless, most persons who prevail at a lower level of the litigatory ladder expect that they will continue to prevail. If such expectations were not sometimes to be frustrated, all forms of administrative and judicial appeal or review would be meaningless.

B. *Damages Resulting from Procedural Violations or From Failure to Develop an Adequate IEP.*

It may be remembered that the Court of Appeals ruled that the Panicos might be entitled to total reimbursement if petitioners' violations of Michael's rights under EHA or related State regulations were serious or if the 1979-1980 IEP were found inadequate (Pet. A. 124a, 135a-137a, 138a). The latter eventuality is all but impossible on the present record. The Panicos' own expert at the administrative hearing, Dr. Lott, found the IEP adequate (R.A. III, pp. 93-95). His testimony was uncontroverted. The hearing officer herself made it reasonably clear that her rejection of petitoners' IEP was not based upon any defects in the IEP[19] but upon her perception that they could no longer be trusted to educate him (Pet. A. 13a). The District Court, of course, found petitioners' IEP would have afforded Michael a free public education in a less restrictive setting, see 20 U.S.C. § 1412(5)(B) and 34 C.F.R. § 300.550(b), than

[18] The First Circuit cited regulations (Pet. A. 135a) adopted by respondent Department of Education requiring immediate implementation of its decisions: 603 C.M.R. § 409.0. These regulations fly in the face of § 1415(e)(3) and, thus, are unenforceable under the Supremacy Clause.

[19] The hearing officer did attempt to raise the possibility that Mr. McAleer, who would have been Michael's teacher at the Pine Glen School, did not have adequate experience in teaching remedial reading to children like Michael (Pet. A. 14a). In light of the experience of Michael's teachers at the Carroll School, see R.A. II, pp. 4-37, 4-38, 4-60 to 4-62, 4-90, 4-91, most of whom were less experienced than Mr. McAleer (J.A. 225), any such basis for the decision was untenable. See Pet. A. 63a.

that chosen by the parents (Pet. A. 62a-63a, 66a). Whatever the remote possibility that yet another trial would produce yet a different decision on this point, damages for failure to produce an adequate IEP would seem to be out of the question in light of the high quality of the education that the judge found petitioners to have offered Michael.

The issue then is whether damages could be awarded as a remedy for procedural violations by "linking" (to use the word of the First Circuit) (Pet. A. 105a) them to the placement of Michael in the Carroll School. A major reason why, even if such violations could ever give rise to an action for damages, they would not do so here is that, as the First Circuit seemed to concede (Pet. A. 104a-105a), there was no evidence that these violations had caused Michael any damage in fact. It is a fundamental principle of law that violation of a legal right creates a remedy by way of damages only if as a consequence of that violation the party claiming them has suffered injury in fact. *Illinois C. R. Co.* v. *Crail*, 281 U.S. 57, 63 (1930). In the absence of the evidence of injury in fact to Michael,[20] stemming from the so-called procedural violations, they could not provide a basis for an award of damages.

A second reason why damages are inappropriate in the present case is that the incidents upon which they were for the most part remote from the rejected IEP and in their entirety facially trivial.[21] We consider these *seriatim*. As

[20] It may be that the Panicos suffered injury in fact when they were (allegedly) not informed that petitioners would pay for the 1977 medical assessment of Michael. Where the Panicos suggested the 1977 core evaluation, they were probably aware of their rights (J.A. 38-39). In any event, the District Court upheld that part of the hearing officer's order that petitioners pay the cost of the 1977 assessment (Pet. A. 67a-68a), and petitioners did not appeal that aspect of the judgment. (D. Ct. Docket Entry No. 311.)

[21] The First Circuit correctly observed that the District Court did not decide whether the violations were serious (Pet. A. 106a). On the other hand, as already noted, the only testimony bearing on this at trial came from petitioners' expert, and his testimony was that the incidents that actually pertained to the 1979-1980 placement were trivial (J.A. 292-293). Since his testimony came before that of the parents expert, Dr. Levine, one might have supposed that if he disagreed with petitioners' expert on this point, that disagreement would have been elicited by the parents' counsel on direct examination. 32A. C.J.S. p. 735. It was not. No testimony contradicting that of petitioners' expert on this point was presented.

was stated by the hearing officer (Pet. A. 17a-20a), they were:[22]

1. Exceeding in 1978-1979 a thirty-six month span in chronological ages of the children in the classroom where Michael would have been educated if the 1979-1980 IEP had been implemented. Mr. Foley, petitioners' coordinator of pupil services, pointed out that information on the chronological span of ages had been submitted by respondent Department of Education's compliance bureau and that petitioners had been found to be in compliance (R.A. III, pp. 378-379).

2. Two specialists' conducting evaluations of Michael of which the Panicos were not notified. The hearing officer's conclusion that the specialists were carrying out a core evaluation of Michael (prior to which the law does require that the parents be notified) was not merely wrong but plainly wrong (R.A. III, p. 442, 449, 455-456; J.A. 212). The core evaluation was not requested until Mr. Panico conferred with petitioners' Core Evaluation Administrator on May 19, 1979 (R.A. III, 386-387), or possibly as late as May 25, 1979 (J.A. 323).

3. Considering, in 1977, retaining Michael in the first grade prior to core evaluation, failing to issue, in 1977, an IEP or a finding of no special needs, and failing, again in 1977, to inform the Panicos of the availability of publicly paid outside medical assessment. See p. 11, *supra*. There is uncontroverted evidence that the reason why no IEP was drawn up after the June, 1977

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[22] We limit our discussions to those actually found by the hearing officer under the heading Regulatory Requirements (Pet. A. 17a), with the exceptions of number 7 (where petitioners were found in "substantial compliance") and number 9 which is discussed in fn 20, *supra*. The hearing officer pointed out that Michael's day would, because of his transportation schedule, be fifteen minutes shorter than the regular school day in Burlington (Pet. A. 9a, 17a) but did not find the shorter day to be a violation. Since the First Circuit states that the hearing officer had found that petitioners "violated numerous state and federal laws in handling the child's special educational plan" (Pet. A. 106a) we point out that the only references in the hearing officer's discussion of supposed violations of federal law are found in paragraphs 2 and 3 under the heading Regulatory Requirements (Pet. A. 17a, 18a), in which she states that the failure in 1977 to notify the parents before considering retention violated EHA. The hearing officer was wrong. There is no requirement in EHA that a child not be considered for retention until an educational plan has been prepared for him. Children may be retained for any number of reasons which have nothing to do with handicaps.

evaluation (see R.A. IV, pp. 1-47) was that no special needs had been indicated at that time (J.A. 198; R.A. III, pp. 401-402).

4. The failure of all persons who contributed to Michael's 1979-1980 IEP to attend the Core Evaluation Meeting. In fact, the school psychologist, Mr. Cavanaugh and Ms. Meade and Ms. Mason, language and learning specialists, were absent. Their written reports were shared with the parents. The hearing officer noted "extenuating circumstances" for their absences; they had met with the parents already. Moreover, Mr. Panico was urging petitioners' to proceed quickly (J.A. 323-324) apparently because of serious emotional problems that Michael was manifesting at home (J.A. 89-90, 319, 354-355; R.A. III, pp. 539-540).

5. Suggesting placement for 1979-1980 before the medical assessment was available. In fact, the Panicos were arranging for the medical assessment, first asking that no IEP be drawn until the assessment came in, then pressing Burlington school authorities to prepare an IEP without the assessment (J.A. 203-205).

6. Modifying the IEP for 1978-1979 without the parents' consent, the time that Michael would have spent in the learning center with his reading tutor, Ms. Black, supposedly having been unauthorizedly shared with another student. Once again, the hearing officer seems to have misunderstood the evidence. Michael was not required at any time to have a single period of the day during which he was the only student working with Ms. Black. That would have been a waste of Ms. Black's time, since part of Ms. Black's time would be spent in assigning Michael independent work to "reinforce" what she had immediately taught (R.A. III, p. 107; J.A. 200-201). He was, however, required to have one hour a day under her tutelage, and this he had at all times had from March of 1978 to June of 1979 (J.A. 222; R.A. III, pp. 107-108, 351-352, 445-446).

Whether these "violations" are considered separately or together, they add up to no more than petty housekeeping oversights. Accordingly, the First Circuit erred in remanding the case to the District Court to determine whether the violations were "serious." They are simply not "serious" enough, under any view of EHA law, to warrant an award of damages being based thereon.

Perhaps the First Circuit's error on this point is the result of its implicit holding (Pet. A. 138a) that serious procedural violations "constitute bad faith."[23] *If* damages can be awarded because local educational authorities have acted in "bad faith," such bad faith is not proven merely by the mere existence of procedural or substantive errors even if they are serious. In *Gildea* v. *Ellershaw*, 363 Mass. 800, 813-818, 822 (1973), the Supreme Judicial Court of Massachusetts held that a public officer, acting within his jurisdiction, is not liable "for mere negligence or errors in the exercise of judgment and discretion in the discharge of his duties." *Id.* at 822. In reaching this decision, the Court explicitly relied on a long line of Federal cases, 363 Mass. at 814-818, including *Spalding* v. *Vilas*, 161 U.S. 483 (1896); *Barr* v. *Mateo*, 360 U.S. 564, 571-572 (1959); and *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir. 1949) (L. Hand, J.). Bad faith is usually equated with actual malice, fraud and corruption. *Gildea* v. *Ellershaw*, 363 Mass. at 820. The record here is too totally devoid of malice, fraud or corruption on petitioners' part to make these points worthy of discussion.

In suggesting that *if* this Court decides that damages are to be awarded, it should restrict them to instances of malice, fraud, or corruption, petitioners reiterate that damages are not the point of EHA, which was enacted to provide for each handicapped child a free appropriate education. Such an education means "specially designed instruction, at no cost to parents to guardians, to meet the unique needs of a handicapped child. . ." 20 U.S.C. § 1401(16), quoted in *Board of Education* v. *Rowley*, 458 U.S. at 188. When damages to one child are awarded out of public funds, they simply diminish amounts available for the education of other children. See *Age* v. *Bullitt County Public Schools*, 673 F.2d 141, 145 (6th Cir. 1982); *Rettig* v. *Kent City School Dist.*, 539 F.Supp. 768, 777 (N.D. Ohio 1981) and cases cited. The field of special education is complex, and the States, or at least the Commonwealth of

[23] This aspect of the right to damages was also supposedly derived from *Anderson*, 658 F.2d at 1214. *Anderson*, however, refers to a school board's failing to comply with the procedural provisions of EHA "in an egregious fashion." There is an obvious difference in emphasis between the language of *Anderson* and that of the First Circuit in this case.

Massachusetts, and the Federal government have enacted numerous procedural and substantive regulations presumably designed to further the goals of EHA. See 34 C.F.R. §§ 300.1-300.395; 603 C.M.R. §§ 100.0-1005.0. Even experts may differ widely on what is the best IEP for a particular child. See, *e.g.*, *Rowley*, 458 U.S. at 207 n.29. In these circumstances it is hardly surprising that local school districts sometimes fail to dot the i's or cross the t's or that an IEP is on review occasionally found less than adequate. Awarding damages for such failures, as the Ninth Circuit pointed out in *Mountain View*, 709 F.2d at 30, will not provide any incentive to avoid repeating them. Punishing "dishonest mistakes" may (or may not) encourage school authorities to get rid of their perpetrators; punishing honest ones will only impoverish State and local school districts.

C. *"Equitable" Considerations.*

Not content to award "reliance" damages to the parents and to suggest the award of damages based on possible defects in the IEP or the seriousness of the procedural violations of Michael's rights,[24] the court below held that no matter how trivial the violations and how adequate the IEP, the Panicos could still recover damages, *i.e.*, be excused from reimbursing petitioners for funds received, if it was "equitable" that they should be excused (Pet. A. 124a, 137a). About what circumstance would make it equitable for the Panicos to recover such damages, the Court said little, pointing specifically only to whether they had asked for permission to enroll Michael in the Carroll School (Pet. A. 131a-132a, 133a).[25] The implication, intended or not, was that parents who reject an IEP later found appropriate are entitled to damages because they asked permission to do what they should not have done. In effect, the First Circuit has said to local school authorities and, by extension of the same logic, to State authorities that they be

[24] Since neither respondent offered evidence at trial to show that the IEP was defective or that the violations were serious, the remand to determine these matters (Pet. A. 138a, 139a) was particularly inappropriate. *Whittaker Corp.* v. *Execuair Corp.*, 736 F.2d 1341, 1346 (9th Cir. 1984).

[25] See n.4, *supra*.

made to pay damages for saying when they should have said no.[26] If this result is founded upon some principle of equity jurisprudence, it is one of which petitioners are totally unaware. Other general bases for an "equitable" award of damages mentioned below, *i.e.*, the reasonableness of the position of the party seeking damages and his compliance with EHA law pending review (Pet. A. 137a-138a), address the substantive and procedural issues presented in all EHA cases. Parents can expect no damages under EHA because their position was "reasonable" or because they complied with the law, although in this case the parents rather plainly did not. See Argument III, *infra*.

The whole concept of an equitable award of damages in a case of this type flies in the face of all principles of equity. There are, to be sure, certain maxims of equity that may be asserted to bar relief to one who has otherwise made out a case for it. These maxims include stale demands,[27] unclean hands,[28] and the failure to pursue legal, administrative or statutory remedies.[29] But we have never heard of such defenses being used as a basis to grant relief. Moreover, even in equity, money damages, if appropriate, are usually granted as of right. See generally, H. McClintock, *Principles of Equity*, § 23 (1948); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968).

The court may have been confused by the circumstance that, here, petitioners seek reimbursement from the Panicos.[30] But this is, as we have already noted, reimbursement of moneys

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[26] We shall not even try to predict where this logic would lead if it were applied to the law of torts and contracts and to equitable and statutory remedies.

[27] See *Barnette* v. *Wells Fargo Nevada Nat. Bank*, 270 U.S. 438, 444-445 (1926).

[28] See *Johnson* v. *Yellow Cab Transit Co.*, 321 U.S. 383, 387-388 (1944). It is arguable that petitioners' § 1415(e)(3) defense is analogous to the defense of unclean hands. See Argument III. If so, it is properly asserted as a defense, not as a basis for relief.

[29] See *Schoenthal* v. *Irving Trust Co.*, 287 U.S. 92, 94-95 (1932).

[30] The reference in the opinion (Pet. A. 133a) to *Doe* v. *Anrig (II)*, 728 F.2d 30 (1st Cir. 1984), suggests such confusion. In *Doe*, it was the parents who were seeking reimbursement, *i.e.*, damages for costs incurred in making a proper placement after they rejected an inappropriate IEP. See *Doe* v. *Anrig (I)*, 692 F.2d 800, 803 (1st Cir. 1982). It was improper for the Court to have awarded any damages in *Doe (II)*, but, assuming the contrary, one can understand why the court, in light of 20 U.S.C. § 1415(e)(3), ruled that the right to damages was not absolute but discretionary.

paid out under protest, see Judge Aldrich's opinion at Pet. A. 71a, with the strict understanding that if petitioners prevailed, they would be repaid. See *Burlington I*, A. 40a, and construction of it found in 5 Shepard's *Causes of Action* 619, 677 (1984). To allow the parents to keep these monies is to award them damages. The situation of parents seeking damages for an inappropriate placement, whether these damages are called "reimbursement" or by any other name, is entirely different from that of a municipality seeking to be reimbursed after it has been forced to pay for an inappropriate private placement on threat of losing its Federal EHA funding. The "reimbursement" sought by petitioners in this case is not in the nature of damages to them, but merely a return of what ought never to have been received. No "equitable" principle could defeat petitioners' right to such reimbursement.

D. *Damages for Years Beyond that for Which an IEP is Drawn.*

Finally, petitioners submit that in no case can damages ever be awarded, as the First Circuit held they could be in the instant case (Pet. A. 123a-124a), for years for which no IEP has been drawn. The whole concept of EHA, as this Court took pains to point out in *Rowley*, 458 U.S. at 181-183, involves the drawing of an IEP, subject to review by an impartial hearing officer and further, more limited review by a court of competent jurisdiction. It is no doubt true that in most cases judicial review of the IEP will not have been concluded by the end of the school year to which it applies.[31] But that does not mean that if the parents and local educational authorities disagree about placement in subsequent years, a new IEP cannot be subject to the same review as the previous IEP.

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[31] This is not to say that all review (except appellate review) is inherently incapable of being concluded within one year. Most courts have the power to control their own dockets and to push urgent cases toward speedy resolution. The power given to the Federal Department of Education to enact regulations, 20 U.S.C. § 1417(b), almost certainly includes the power to require State administrative agencies to hear EHA cases with dispatch. See 34 C.F.R. § 300.512(b); 603 C.M.R. § 403.0.

When State or local educational agencies are required to respond to an educational placement which they have never been able to evaluate or discuss, much less approve or disapprove, in light of the child's current needs, the whole administrative machinery contemplated by EHA is frustrated and EHA becomes nothing more than a statutory action for damages. If agencies responsible for the drawing of a new IEP neglect or refuse to do so, the sanctions contemplated by 20 U.S.C. §§ 1414 and 1416 should be promptly applied.

Here, however, the Panicos frustrated the drawing of a new IEP. Through their attorney, on August 21, 1980 they stated that they would not provide petitioners with "reports or other information" (J.A. 183). Admittedly the initial noncooperation was in connection with a request for a ten month evaluation. To the extent that the First Circuit implied that a ten month evaluation is permissive rather than mandatory (Pet. A. 123a), it was in error. 603 C.M.R. § 333.0. Four months later, on December 7, 1980, the Panicos demanded that an IEP be drawn (J.A. 184). They even offered to make records available to help petitioners to draw an IEP. However, a condition attached to the offer was that "the persons compiling the information and drafting of the plan be not adversaries in any court proceeding or under the influence of an adversary." (J.A. 185.) In other words, no employee of or consultant to the Burlington public schools could participate in drawing an IEP. Petitioners rejected any scheme under which, in order to draw an IEP for Michael, they would effectively have had to hire a team that had no connection with their public schools. To justify that rejection one need not look beyond the point that the type of "team" demanded by the parents would have violated State and Federal law. 34 C.F.R. § 300.347(a) and 603 C.M.R. § 311.0 *et seq*. This, therefore, is a totally inappropriate case in which to award damages for any year after 1979-1980.

III. In Any Event, Where Parents Unilaterally Change the Placement of a Child from a Public to a Private School While EHA Proceedings are Pending, They Forfeit the Right to Any Relief, Administrative or Judicial, by Way of Damages or Otherwise.[32]

Congress has at least by implication, and explicitly in 20 U.S.C. § 1400(b)(4) and (6), shown a preference that handicapped children be educated in the public schools. That is to say, in 20 U.S.C. § 1414(a)(1)(c)(iv) Congress has required that "to the maximum extent practicable" local educational agencies must offer programs to enable handicapped children "to participate in regular educational programs", and § 1412(5)(b) requires every state to formulate "procedures to assure that . . . handicapped children . . . are educated with children who are not handicapped." The vast majority of American children are educated in the public schools. See Select Committee on Children, Youth and Family, *U.S. Children and Their Families*, p. 21 (U.S. Govt. Printing Office, 1983), where it is stated that the total enrollment in 1981 in grades K-12 in regular public and private schools was 45,190,000; enrollment in private schools as a percentage of total enrollment was 11.6% for grades K-8 and 9.8% for grades 9-12.[33]

Congress was presumptively aware of this fact when it enacted these statutes. *United States* v. *Champlain Refining Co.*, 341 U.S. 290, 296 (1951); *Ranes* v. *Office Employees International Union*, 317 F.2d 915, 918 (7th Cir. 1963). Although Congress most certainly did not make the education of handicapped children in the public schools mandatory, these

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[32] This argument is plainly related to arguments I and II. If 20 U.S.C. § 1415(e)(3) is construed to bar a unilateral change of placement, either absolutely or in the circumstances of this case, the parents can obtain no damages for expenses incurred in changing Michael's placement. Moreover, § 1415(e)(3) cuts off not merely the right to damages but to prospective relief as well, where the relief is plainly related to an unlawful change of placement. *Rowe* v. *Henry County School Bd.*, 718 F.2d 115, 117-118 (4th Cir. 1983). It is entirely possible to rule that, however § 1415(e)(3) is construed, EHA creates no right to damages.

[33] It is exceedingly unlikely that these statistics would have been significantly different in 1975 when EHA was enacted.

provisions, implemented by regulation, 34 C.F.R. § 300.550(b)(1), make education in the public schools for handicapped children the likeliest eventuality. Moreover, the the legislative history of EHA contains many references to "free appropriate public education" and "public education for handicapped children." 121 Cong. Rec. H. 37024, 37025, 37027, 37028, 37030 (November 18, 1975); 121 Cong. Rec. S. 37413, 37414, 37418 (November 19, 1975). Perhaps the most succinct statement elucidating the purpose of EHA, see 20 U.S.C. 1400(c), was that of Representative Mink at 121 Cong. Rec. H. 37030: "Handicapped children have the same right as a nonhandicapped child to participate in our public school system and enjoy the benefits of a public education." Petitioners attempted to educate Michael in a public school, the Pine Glen School, when they drew the 1979-1980 IEP, and further made provisions for "mainstreaming," integrating Michael into activities with nonhandicapped children (J.A. 210, 238; Pet. A. 16a).

Whereas the will of Congress was that handicapped children be, if possible, educated in the public schools, *Rowley*, 458 U.S. at 189, parents of such children appear in numerous instances to prefer that they be educated in private schools. Indeed, the majority of reported EHA cases involving placement seem to involve a conflict between a parental preference for private education and the preference of local or state school authorities for public education. See Addendum. The reasons why so many parents prefer private education are open to speculation. In part, the cachet that private education enjoys with respect to the education of nonhandicapped children may carry over in some minds to the education of handicapped children.[34] Perhaps, since in practice the parents often select the private school at which their handicapped child is educated, they may feel that they have more to say about their child's education even though a third party is paying the tuition. Finally, because more learning-disabled children begin their

[34] Almost certainly influenced by adult conversations that he had heard, even Michael formed opinions in this regard. See J.A. 48. Compare J.A. 346.

careers in the public schools[35] and because learning disabilities remain difficult to remedy and frustrating for parent and child alike,[36] the public schools may well become the lightning rod

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[35] See *Fifth Annual Report to Congress on the Implementation of Public Law 94-142*: "The overall percentage of handicapped children served in regular schools, whether in regular or separate classes has remained relatively constant at more than 92% since P.L. 94-142 was enacted." Page xv (Division of Educational Services Special Education Programs, U.S. Department of Education, 1983).

[36] Learning disabilities are generally agreed to be persistent. Even as an adult a childhood dyslexic will generally remain a relatively poor reader and word speller. Carter, R.P.A., A descriptive analysis of the adult adjustment of persons once identified as disabled readers. Unpublished doctoral dissertation, University of Indiana, Bloomington, 1964. As cited in B. Herjanic and E. Penic, Adult outcome of disabled child readers. *Journal of Special Education*. 1972, *6*, 397-410. Dykman, R.A., Peters, J.E. and Ackerman, P.T., Experimental approaches to the study of minimal brain dysfunction: A follow-up study. *Annals of the New York Annals of Science*, 1973, *205*, 93-108. Gottesman, R., Belmont, I., and Kaminer, R., Admission and follow-up status of reading disabled children referred to a medical clinic. *Journal of Learning Disabilities*, 1975, *8*, 642-650. Hardy, M.E., Clinical follow-up study of disabled readers. Unpublished doctoral dissertation, University of Toronto, Canada, 1968. As cited in B. Herjanic and E. Penick, Adult outcome of disabled child readers. *Journal of Special Education*, 1972, *6*, 397-410. Howden, M.E., A nineteen-year follow-up study of good, average and poor readers in the fifth and sixth grades. Unpublished doctoral dissertation, University of Oregon, Eugene, 1967. As cited in B. Herjanic and E. Penick, Adult outcome of disabled child readers. *Journal of Special Education*, 1972, *6*, 397-410. Kline, C.L., The adolescents with learning problems: how long must they wait? *Journal of Learning Disabilities*, 1972, *5*, 127-144. Muehl S. and Forell, E.R., A follow-up study of disabled readers: Variables related to high school reading performance. *Reading Research Quarterly*, 1973, *9*, 110-123. Rourke, B.P. and Orr, R.R., Prediction of the reading and spelling performances of normal and retarded children: A four-year follow-up. *Journal of Abnormal Child Psychology*, 1977, *5*, 9-20. Rutter, M., Tizzaro. J., Yule, W., Graham, P. and Whitmore, K., Isle of Wight Studies, 1964-1974. *Psychological Medicine*, 1976, *6*, 313-332. Spreen, O., Neurospsychology of learning disorders: Post conference review. In R. Knights and D.J. Bakker (Eds.), *The Neuropsychology of Learning Disorders: Theoretical Approaches*. Proceedings of NATO Conference. Baltimore, Maryland: University Park Press, 1976.

The more comprehensive, representative and well defined the childhood sample, better controlled the design and longer the period of followup, the worse is the dyslexic and group educational outcome. Schonhaut, S and Satz, P., Prognosis of the Learning Disabled Child: A review of the Follow-up Studies. In Rutter, M. (Ed.) *Developmental Neuropsychology*. Guilford Press, 1983. It is not that poor readers altogether fail to improve their reading skills over time. They do, to the extent that few reach their adult years totally

that attracts the anger and hostility to which frustration so often leads. Yet there is no evidence that private schools for children with learning disabilities have better success in remediation than public schools. Indeed, in this case there was uncontroverted evidence that by the time of trial Michael had progressed at no greater rate in his three years at the Carroll School than he had in his three years at petitioners' Memorial School (J.A. 396-397, referring to Df.'s Ex. 15, R.A. I, pp. 253-254, R.A. II, p. 3-151). This is truly amazing when one recalls that at the Memorial School he was receiving only one hour per day of specialized instruction (R.A. IV, p. 340). Thus, whatever may be the reason for the parental preference for private rather than public education of handicapped children, neither the facts of this case nor any evidence of a more general nature indicates that private schools generally offer superior education to handicapped children.[37]

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illiterate. But also, few achieve normal reading levels at any age. Scarborough, H.S., Continuity between childhood dyslexia and adult educational reading. *British Journal of Psychology*, 1984, *75*, 329-348. When, as in the case of Michael, a child's learning disability is complicated by an attention deficit (see testimony of medical experts both for plaintiff and for defendant), the prospects for successful remediation are less yet. The persistent nature and negative implications of this condition are by now thoroughly documented. Thorley, G., Review of Follow-up and Follow-back Studies of childhood hyperactivity. *Psychological Bulletin*, 1984, *96*, 116-132. These include unsatisfactory educational outcomes. Borland, B.L. and Heckman H.K., Hyperactive boys and their brothers: A 25 year follow-up study. *Archives of General Psychiatry*, 1976, *33*, 669-675. Hoy, E., Weiss, G., Minde, K., and Cohen, H., The hyperactive child at adolescence: Cognitive, emotional and social functioning. *Journal of Abnormal Child Psychology*, 1978, *6*, 311-324. Minde, K., Lewin, D., Weiss, G., Laviguer, H., Douglas, V. and Sykes, E., The hyperactive child in elementary school: A 5 year, controlled, follow-up. *Exceptional Children*, 1971, *38*, 215-221.

[37] Of course, there may be instances in which a particular private program is better than a particular public program for a particular child. Such instances, however, do not appear to add up to any meaningful statistical showing of over-all superiority. When a learning disabled child is shifted from the educational mainstream to an institution specialized in remedial education, his educational prospects are not necessarily improved. A recent and particularly well controlled study found the following typical outcome: the dyslexics as a group functioned well below norms in reading; those remediated at a prestigious remedial resource fared no better than the rest. Bruck, M., The adult functioning of children with specific learning disabilities. *Final Report to Health and Welfare Canada, Health Programs Branch* (Project Grant 6605-1508-44). Presented August, 1981.

Between parents desiring private education for their handicapped children and local (and often State) educational agencies, perhaps with an eye on the public fisc, preferring public placement, stand the provisions of § 1415(e)(3). This statute forbids a change of placement while administrative or judicial proceedings are pending unless the change is agreed to by the parents and the appropriate local or State educational agency. For reasons that petitioners will discuss, this statute was correctly construed by several courts, beginning with the Fourth Circuit in *Stemple* v. *Board of Education of Prince George's County*, 623 F.2d 893, 897-898 (4th Cir. 1980) *cert. den.*, 450 U.S. 911 (1981). *Stemple* and its progeny basically hold that parents who, without permission, remove a handicapped child from a mandated public placement to a private one while administrative or judicial proceedings are pending forfeit all right to relief under EHA.[38] However, before coming to that point, petitioners believe it prudent to discuss two points raised but not decided by the First Circuit in the present case.

A. *What is the "Current Placement" for Purposes of § 1415(e)(3)?*

In June of 1979 when the rejected IEP was drawn, Michael was finishing his third-grade year at Memorial School. The rejected EIP would, of course, have placed him in Mr. McAleer's class in Pine Glen for the subsequent year. The Panicos never indicated the slightest desire to have Michael returned to the Memorial School — indeed, a major part of their case before the hearing officer consisted of allegations about how detrimental the Memorial School had been for Michael (J.A. 41-42, 44, 45, 48-49, 64, 81-83, 90-91, 110, 113-114) — and, thus, this Court might prudently save for another day the issue of a change of placement opposed by parents who favor the immediate prior placement. See *Concerned Parents* v. *New York City Board of Education*, 629 F.2d 751, 754 (2d Cir.

[38] Indeed, the *Stemple* decision can be read in jurisdictional terms: after an illegal change of placement neither a hearing officer not a court has jurisdiction to grant relief. 623 F.2d at 896-898.

1980); *Tilton* v. *Jefferson County Board of Education*, 705 F.2d 800, 804 (6th Cir. 1983). If, however, the Court should reach the issue, on the facts of this case petitioners submit that the current placement the Panicos had no right to change was the placement at the Pine Glen School mandated by the 1979-1980 IEP.[39]

This position is supported by numerous grounds. First, as already noted, neither petitioners nor respondents ever favored keeping Michael in the Memorial School. To read § 1415(e)(3) as requiring a child to stay in a placement that neither the parents nor the local school authorities approve is to give it a construction that is close to absurd. Absurd results in the construction of a statute are to be avoided. *United States* v. *Turkette*, 452 U.S. 576, 580 (1981).

Secondly, the IEP under which Michael received instruction in the Memorial School had by its own terms expired on March 23, 1979 (R.A. IV, p. 190).[40] Thus, there was no effective placement in effect when the new IEP was drawn up. In *Mountain View*, 709 F.2d at 29, where § 1415(e)(3) was also applied to bar reimbursement to parents who had unilaterally placed their child in a private school, the private school placement was made at a time when there was for all intents and purposes no placement in effect. Analogously, the placement at Pine Glen under the rejected IEP was the only placement in effect when Michael was enrolled in the Carroll School.

This factor leads directly to the next reason for regarding Pine Glen as the "placement" that should not have been changed unilaterally under § 1415(e)(3). The Pine Glen placement was supposed to take effect in September of 1979 after the close of the 1978-1979 school year. The end of a school year marks a time when placements might often change automatically for all children in public schools, handicapped or not. The change may be the result of a child's reaching a grade or chronological age at which he would no longer remain in a particular school.

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[39] This was the view of Judge Aldrich (Pet. A. 82a-84a), who noted that the assumption that the Carroll School was the "current . . . placement" appeared to be a mistaken impression of the facts (Pet. A. 83a).

[40] This IEP had been approved by the Panicos (R.A. IV, p. 341).

Anderson v. *Thompson*, 658 F.2d at 1208 n.4. Since, as we have already noted, handicapped children are as far as possible to be educated as they would be if they were not handicapped, mandating another placement to take effect at the beginning of a new school year is not to be regarded necessarily as a change in placement. *See* 603 CMR 333.0.

Fourth, and perhaps most important, no proceedings, administrative or judicial, were pending when the 1979-1980 IEP was adopted. In the present case, because the parents enrolled Michael in the Carroll School during the summer recess, the placement mandated by the IEP never took effect. But this was also the case in *Monahan* v. *Nebraska*, 645 F.2d 592, 597 (8th Cir. 1981) and *Rowe* v. *Henry County School Bd.*, 718 F.2d 115, 116-117 (4th Cir. 1983), cases cited by the First Circuit as being in accord with *Stemple* (A. 127a) and in which § 1415(e)(3) was applied to bar reimbursement to the parents. Proceedings were plainly pending when Michael commenced his studies at the Carroll School in September, 1979. (J.A. 28, 30, 34, 35). The words "*then* current placement" (emphasis supplied) in § 1415(e)(3) almost certainly refer to the placement in effect or scheduled to take effect when proceedings are commenced. Indeed, the *Stemple* court explicitly held that any change of placement by the parents after an IEP is adopted but before any proceedings are pending violates § 1415(e)(3). 623 F.2d at 898.

B. *What Constitutes Permission to Change an Existing Placement?*

The Court of Appeals found it unnecessary to rule on the contention that the January, 1980 decision was a retroactive agreement that Michael be placed in the Carroll School (Pet. A. 132a). Even if the Court had adopted this view, its decision would have been contrary to that of *Mt. View*, 709 F.2d at 30. We assume that under the law of contracts an agreement may, if the parties so state, operate retroactively. But the word "agree" cannot be wrenched from the language of § 1415(e)(3). As this Court said in *United States* v. *Morton*, 104 S.Ct. 2769,

2773 (1984): "We do not . . . construe statutory phrases in isolation; we read statutes as a whole." If § 1415(e)(3) permitted parents to "agree" retrospectively, by prevailing at state administrative hearings or perchance by prevailing in proceedings under § 1415(e)(2), it would mean exactly what *Stemple* and other cases have said that it does not mean: that parents may unilaterally place their handicapped children in private schools and hope that somewhere along the way their decision to do so will be "ratified." All of the reasons marshalled against the First Circuit's position that self-help is permissible, see pp. 45-52, *infra*, apply equally to the position that there can be retroactive agreement. Indeed, either position is contrary to 34 C.F.R. § 300.347(a)(1) and (2), which provides that before there is a lawful placement in a private school, *i.e.*, one approved by state or local authorities, there must first be a meeting to develop an IEP in which a representative of the private facility participates. No such meeting can occur when parents resort to self-help and hope for retroactive agreement.[41] This Court has just noted that EHA regulations adopted by a Department of Education "are

[41] Massachusetts does not seem to have provided for state-authorized agreements to change the placement after administrative hearings have been completed. Compare 603 C.M.R. § 327.1 (allowing for good cause change of placement of child in regular program on request of parents or school committee pending administrative proceedings). But see 603 C.M.R. § 327.2 (placement of child, like Michael, in special education program should, pending administrative proceedings, be in regular program at parents' request, which is subject to review at the behest of the school committee). There appears to be no provision for state authorities to agree to place a child who is already in a special education program in a different special education program while administrative or judicial proceedings are pending. Massachusetts General Laws c. 71B, § 10 seems to address only the situation in which both the parents and the school committee agree on private education. It may be that Massachusetts has adopted no regulations providing for State agreements with parents concerning placement pending § 1415(e)(2) proceedings because it takes the position, see 603 C.M.R. § 409.0, that immediate implementation of administrative decisions is required. That position, however, is in conflict with § 1415(e)(3) and, therefore, untenable under the Supremacy Clause. *Florida* v. *United States*, 292 U.S. 1, 12 (1934). It is at least conceivable that a state agency, even having decided that a private school placement was superior to a proposed public school placement, would nevertheless, if permission-granting machinery were in place, refuse to grant permission to change the placement pending judicial review, giving some consideration to the possibility that the administrative decision would not be upheld and the change in placement would be only temporary. See and compare the first sentence of Title 5 U.S.C. § 705; *Abrahamson* v. *Hershman*, 701 F.2d 223, 225 (1st Cir. 1981).

entitled to deference." *Irving Independent School Dist.* v. *Tatro,* 104 S.Ct. 3371, 3377 (1984).

Since the Panicos changed Michael's placement and did so without permission, this case presents the question ,"squarely", to use the word used by the First Circuit (Pet. 127a), of the implementation to be given to § 1415(e)(3) in EHA cases. The language of § 1415(e)(3) is categorical in form. During the pendency of any proceedings conducted pursuant to § 1415, unless there is agreement to the contrary, "the child shall remain in the then current placement." Congress could hardly have used clearer language. The First Circuit concluded, however, that this language "is directory rather than mandatory" (A. 129a). In part its construction derives from a statement in the legislative history "wherein a Conference Committee Senator explained that the Committee felt that 'a placement or change of placement should not be unnecessarily delayed while long and tedious administrative appeals were being exhausted. Thus the conference adopted a flexible approach.' 121 Cong. Rec. 37412 (November 19, 1975)" (Pet. 128a.). When the Court below claimed that this was "the only Legislative history directed to § 1415(e)(3)" (A. 128a), it was plainly in error. At 121 Congressional Record 37416 (November 19, 1975) the following statement by Senator Williams appears:

> The provisions of existing law with respect to the binding effect of due process hearings and appropriate administrative and judicial review of such hearing are clarified and language is also adopted to require that during the pendency of any administrative or judicial proceedings regarding a complaint, unless the State or local educational agency and the parents or guardian of the child otherwise agree, the child involved in the complaint shall remain in his or her present educational placement.

There is nothing in the statement quoted in the Opinion of the First Circuit that is inconsistent with this later statement or, indeed, with the actual language of § 1415(e)(3). Moreover, this Court has admonished that "one isolated remark by a single Senator, ambiguous in meaning when examined in context, is

insufficient to establish" the will of Congress. *Weinberger* v. *Rossi*, 456 U.S. 25, 35 (1982). The First Circuit was also in error when it stated (Pet. A. 127a): "The rule the Fourth Circuit adumbrated in *Stemple* . . . was an interpretation of § 1415(e)(3) in opinions which did not rely on either the Act's legislative history or the structure and purposes of the Act as a whole." In fact, the Fourth Circuit in *Stemple* gave careful consideration both to the purpose of the act and its Legislative history. 623 F.2d at 896-897.

Courts that have followed *Stemple*, have generally pointed, correctly, to the unequivocal language of § 1415(e)(3). *Monahan* v. *Nebraska*, 645 F.2d at 598; *Zvi D.* v. *Ambach*, 694 F.2d 904, 906 (2d Cir. 1982); *Rowe* v. *Henry County School Board*, 718 F.2d at 117-119; *Marvin H.* v. *Austin Independent School Dist.*, 714 F.2d at 1353. Courts that have attempted to supply a reason why § 1415(e)(3) should bar any relief to those who violated its express terms have noted that there is no other means of implementing its provisions, *Stemple*, 623 F.2d at 597, that EHA was intended to further parental cooperation rather than unilateral action, *Scokin* v. *Texas*, 723 F.2d 432, 439 (5th Cir. 1984), and that self-help transfers to private schools followed (as they almost invariably seem to be) with a request that the public bear the cost pose a huge expense to the local or State treasury, all the worse for being unforeseeable to those who prepare school budgets. *Mountain View*, 709 F.2d at 30. See *Age* v. *Bullitt County Public Schools*, 673 F.2d at 145.

These reasons are cogent enough, but they do not exclude other reasons that Congress may have had. First, by confronting hearing officers and judges with a *fait accompli*, parents, especially those unable to afford private education without help, may arouse a sympathy that will cause these cases to be decided on the basis of the financial predicament in which the parents will find themselves if they do not prevail and, concomitantly, the likelihood that the child's education will be interrupted in the middle of the school year by the refusal of public funding. In the present case, one may surmise that the hearing officer might, in her own words, "have acceded to [petitioners'] suggestion to try the new program" (Pet. A. 13a), *if* Michael had

not already been attending the Carroll School by the time the hearings began.

Second, § 1415(e)(3), by acting as a brake on hasty or ill-considered action, allows, even in cases in which an IEP does not provide an appropriate placement, for consideration of alternative public or private placements that may be better than that contemplated by the parents or the local educational agency and may have occurred to neither of them. Once a unilaterally chosen placement has taken effect, the battle will almost certainly be between the placement contemplated by the IEP and that chosen by the parents, with all other alternatives duly ignored.

Third, Congress may well have reasoned that the only parents who could take the financial risk and make the initial investment involved in enrolling a child in a private school are those of means. Since self-help would only benefit a respectively small segment of the population, Congress may have considered it appropriate to bar it altogether, especially since one of the avowed purposes of EHA was to bring the benefits of a free appropriate education to all handicapped children, regardless of means. 20 U.S.C. § 1400(c); Joint Statement of the Conference Committee, U.S. Code Cong. and Admin. News 1482 (1975).

If Congress acted for any of these reasons, it acted rationally. But several courts, including the First Circuit in this case, have purported to find reasons why Congress did not mean what it said in (e)(3) or, at least, meant less than what it said. The First Circuit buttressed its position that 1415(e)(3) is intended to be directory rather than mandatory by pointing out that some school districts might deliberately use the rationale of *Stemple* and like cases to avoid their duties to diagnose and place handicapped children and that the financial risks involved in placing a child in a private school that was later found to be inappropriate was a sufficient deterrent to a hasty or ill-conceived transfer (Pet. A. 129a-131a). Addressing the former point, we point out that there is no basis for a belief that local

local educational authorities will so frequently and deliberately disregard their duties toward handicapped children under Federal law that self-help is the only practicable remedy. All presumptions are to the contrary. *O'Shea* v. *Littleton*, 414 U.S. 488, 496-497 (1974); *Rizzo* v. *Goode*, 423 U.S. 362, 370 (1976). Moreover, such wholesale deviation from law is, on account of its very magnitude, best remedied by the sanctions of §§ 1414 and 1416, and not by individual self-help.

The argument that the financial risk involved in making a private school placement later found to have been unwarranted is a sufficient deterrent ignores the problem that by taking the risks the parents, at least in some cases, shift the balance in their favor. As the petitioners have already implied, it is simply easier for a hearing officer or a judge to reach into the presumably "deep pockets" of municipalities and States than it is to saddle the parents with paying for private education once the necessity of paying for it is an established fact. More than that, Congress could have allowed self-help to parents dissatisfied with local- or State-mandated placement and allowed them the financial risk of non-reimbursement if the self-help proved inappropriate. However, in § 1415(e)(3) Congress chose to prohibit self-help. To decide that the risk of non-reimbursement might satisfy whatever objectives Congress had with respect to the prohibition of § 1415(e)(3) is, quite simply, to rewrite the statute. Such legislation is entirely beyond the power of the courts. See Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 Harv. L. Rev. 892, 894-895 (1982). As Justice Frankfurter wrote in *Sixty-two Cases, More or Less, Each Containing Six Jars of Jam* v. *United States*, 340 U.S. 593, 596 (1951): "After all, Congress expresses its purpose by words. It is for us to ascertain — neither to add nor to subtract, neither to delete nor to distort."

It would appear, however, that the First Circuit in this case concluded that even if (e)(3) is read as mandatory, two exceptions permitting self-help should be read into it (Pet. A. 130a and 138a). One involves a situation in which a child is suffering irreparable damage by being forced to remain in his current

placement pending administrative hearing (Pet. A. 130a).[42] Curiously, in what appears to have been the earliest appellate case to have adumbrated this rule, *Anderson* v. *Thompson*, 658 F.2d at 1213-1214, the placement chosen by the defendant school authorities was apparently found not to have caused irreparable damage. *Id.* at 1208, 1214 n.13. See same case, 495 F.Supp. 1256, 1269 (E.D. Wis. 1980). Likewise, there is nothing in the present record to indicate that Michael would have suffered irreparable damage from the placement at Pine Glen. As the Eighth Circuit said in *Miener*, 673 F.2d at 980: "But in the present case, nothing in the record suggests . . . exceptional circumstances like any of those in the cited cases." The First Circuit might, therefore, have been well advised to wait until it had a case in which there was good reason to believe that the child would have suffered irreparable damage if a change in placement had not been effected while the administrative process was pending before deciding whether the threat of such damage justified a judicially created exception to § 1415(e)(3). See *Permian Basin Area Rate Cases*, 390 U.S. 747, 755, *reh. den.* 392 U.S. 917 (1968).

If, however, the First Circuit was right to reach the issue, it was wrong in holding that the threat of irreparable injury to the child allowed the parents to change the placement, without permission from anyone, while administrative proceedings were pending. The error seems to stem from the court's misapprehension that even in cases where maintaining the status quo involves irreparable damage to the child, a court is without power to issue a preliminary injunction until administrative proceedings are completed (Pet. A. 130a: "until a district court properly has jurisdiction and can issue a preliminary injunction"). Where irreparable damage to Federal rights are threatened, a district court has power to issue an injunction to prevent it in advance of the completion of administrative proceedings. *Pacific Telephone & Telegraph Co.* v. *Kuykendall*, 265 U.S. 196, 201, 204-205 (1924); *Shields* v. *Utah Idaho Central Railroad Co.*, 305 U.S. 177, 183-184 (1938); *Scripps-*

[42] See cases collected at 5 Shepard's *Causes of Action*, pp. 681-682, 685 (1984), in which other courts read such an exception into (e)(3).

Howard Radio Co., Inc. v. *Federal Communications Commission*, 316 U.S. 4, 9-10 (1942); *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U.S. 341, 349-350, (1951) (dictum). See *Leedom* v. *Kyne*, 358 U.S. 185, 190 (1958). The Supreme Judicial Court of Massachusetts has so construed the power of the Massachusetts trial court in EHA cases. *Stock* v. *Massachusetts Hospital School*, 392 Mass. 205, 213 (1984).

In those cases where the parents can demonstrate that the child will suffer irreparable damage if the status quo is maintained while administrative proceedings are pending, it is, for several reasons, far preferable that a court of competent jurisdiction be asked to grant preliminary relief than to have the parents resort to self-help.[43] First, a court can make due inquiry as to what effort the parents had made to use the available administrative process to avoid this irreparable damage. See *e.g.* 603 C.M.R. §§ 327.1, 327.2. Second, a court can often prod the administrative process to speedy resolution resulting in a final decision, which then of course can be the subject of a § 1415(e)(2) proceeding. In the course of such a proceeding, there appears to be no question about the power of the court to issue a preliminary injunction, *Doe* v. *Brookline School Committee*, 722 F.2d at 917. Third, the court will have the benefit of determining whether to issue or nor to issue an injunction at a time when no irrevocable or nearly irrevocable commitments have been made and no dire consequences for the parents or the child have stemmed from such commitments. Since EHA focuses exclusively on a free appropriate future education for the handicapped child, it is highly desirable that the question of irreparable damage be decided at a time when such commitments have not been made and such consequences have not come to pass. Fourth, even the presumably limited hearing that a judge would hold in determining whether or not to grant relief could result in some enlightenment to each side about the position of the other. For example, in this case, had the parents known in the summer of 1979 that Mr. McAleer's

[43] See generally, L. Jaffee, *Judicial Control of Administrative Action*, 193-194 (1965).

class was not a classroom for emotionally disturbed children (J.A. 208, 227; R.A. III, pp. 330-332) and had they been aware of Mr. McAleer's successes in dealing with children who had learning disabilities similar to Michael's (J.A. 208, 244), they very conceivably would not have placed Michael in the Carroll School. Moreover, they certainly would have become aware that placement in Mr. McAleer's class would not have caused Michael irreparable damage (Pet. A. 62a-63a). Once a child has actually commenced his studies at a private school, the position of the parents necessarily hardens, both because of financial considerations and because of the loss of face involved in returning the child to the public school. Finally, self-help is not the traditional remedy to prevent irreparable damage at the hands of government: resort to the courts is. See *United States* v. *Bailey*, 449 U.S. 394, 410-411 and n.8 (1980) citing *People* v. *Richards*, 269 Cal. App. 2d 768 (1969). There is no reason to depart from that salutary principle for purposes of EHA law.

The First Circuit read yet another exception into § 1415(e)(3), also based on *Anderson* v. *Thompson*, 658 F.2d at 1214. This was the "bad faith" exception, announcing that past serious procedural errors committed by local educational agencies in educating a handicapped child amounted to bad faith and thus justified a unilateral change in placement (Pet. A. 138a). We have already pointed out at p. 32, *supra*, that the court erred in equating procedural violations, even if they were serious, with bad faith. We suggest that past conduct of local educational agencies toward a handicapped child can never, by itself, be a ground for disregarding the provisions of § 1415(e)(3). EHA looks not to the past but the future. The only question properly before a hearing officer or a court in a EHA case is whether the IEP offers the child a free appropriate education. If it does, it should be implemented as written. So much would be true in any case, but it is especially true here for at least two reasons. One, which we have already discussed at length, is the relative triviality of the violations found. See pp. 30-31, *supra*. A second reason is that petitioners' placement at Pine Glen was plainly less restrictive then the parents' placement at the Carroll School. Congress has required that

handicapped children be, as far as possible, educated as they would be if they were not handicapped. 20 U.S.C. §§ 1412(5)(B) and 1414(a)(C)(iv). Federal regulations require that as far as possible handicapped children be mainstreamed, *i.e.*, educated with nonhandicapped children, 34 C.F.R. § 300.550(b)(1). Requiring local school authorities to pay for their past "transgressions" toward a handicapped child by providing him with more restrictive education is plainly contrary to the intention of EHA. Bad faith may well appear when, whatever the local educational agency has put on paper, it can be shown that the IEP is a mere sham. With a sense of the absurd one might imagine a case in which the local educational authorities propose what is, as written, a perfectly adequate IEP for a handicapped child but one which calls for him to be educated in a classroom that does not exist and never will exist. In that event, however, there would plainly be an issue of irreparable damage, making resort to the courts, and not self-help, the appropriate remedy. See pp. 50-51, *supra*.

Conclusion.

For the reasons given, the judgment should be reversed and the case remanded to the Court of Appeals with instructions to order the parents to reimburse petitioners as required by the judgment of the District Court.

Respectfully submitted,

DAVID BERMAN,
Counsel of Record,
JANE KENWORTHY LEWIS,
BERMAN AND MOREN,
100 George P. Hassett Drive,
Medford, Massachusetts 02155-3297.
(617) 395-7520
Attorneys for the Petitioners

Addendum.

Relying on reference to EHA in Shepard's *United States Citations*, Statute Edition Supplements: 1974-1979, 1979-1983, and July, November and December 1984, petitioners have found 129 reported cases in which the placement of a handicapped child was in issue. In the following 76 cases the parents or guardians elected private placement for a handicapped child and demanded that local or State educational agencies ratify such private placement.

FIRST CIRCUIT

Town of Burlington v. *Department of Education for the Commonwealth of Massachusetts*, 736 F.2d 773 (1st Cir. 1984) *rev'g in part and remanding*, 561 F.Supp. 121 (D. Mass. 1983), *same case* 655 F.2d 428 (1st Cir. 1981)

Doe v. *Anrig*, 728 F.2d 30 (1st Cir. 1984) *aff'g*. 561 F.Supp. 121 (D. Mass. 1983), *same case* 692 F.2d 800 (1st Cir. 1982)

Abrahamson v. *Hershman*, 701 F.2d 223 (1st Cir. 1983)

Colin K. v. *Schmidt*, 715 F.2d 1 (1st Cir. 1983) *aff'g*. 536 F.Supp 1375 (D. R.I., 1982), *same case* 528 F. Supp. 355 (D. R.I. 1981)

Doe v. *Brookline School Committee*, 722 F.2d 910 (1st Cir. 1983)

Ezratty v. *Commonwealth of Puerto Rico*, 648 F.2d 770 (1st Cir. 1981)

Doe v. *Lawson*, 579 F.Supp. 1314 (D. Mass. 1984)

Blomstrom v. *Massachusetts Department of Education*, 532 F.Supp. 707 (D. Mass. 1982)

Turillo v. *Tyson*, 535 F.Supp. 577 (D. R.I. 1982)

Jaworski v. *Rhode Island Board of Regents for Education*, 530 F.Supp. 60 (D. R.I. 1981)

Norris v. *Massachusetts Department of Education*, 529 F.Supp. 759 (D. Mass. 1981)

SECOND CIRCUIT

Dubois v. *Connecticut State Board of Education*, 727 F.2d 44 (2nd Cir. 1984)
Zvi D. v. *Ambach*, 694 F.2d 904 (2nd Cir. 1982) *aff'g* 520 F. Supp. 196 (E.D. N.Y. 1981)
Riley v. *Ambach*, 668 F.2d 635 (2nd Cir. 1981), *rev'g* 508 F.Supp. 1222 (E.D. N.Y. 1980)

Smrcka v. *Ambach*, 555 F.Supp. 1227 (E.D. N.Y. 1983)
Flavin v. *Connecticut State Board of Education*, 553 F.Supp. 827 (D. Conn. 1982)
Gregg B. v. *Board of Education of the Lawrence School District*, 535 F.Supp. 1333 (E.D. N.Y. 1982)
Lombardi v. *Ambach*, 522 F.Supp. 867 (E.D. N.Y. 1981)
Papacoda v. *State of Connecticut*, 528 F.Supp. 68 (D. Conn. 1981) (dispute over extent of private education)
Stanger v. *Ambach*, 501 F.Supp. 1237 (S.D. N.Y. 1980)
Frankel v. *Commissioner of Education*, 480 F.Supp. 1156 (S.D. N.Y. 1979)

THIRD CIRCUIT

Grymes v. *Madden*, 672 F.2d 321 (3rd Cir. 1982)
Kruelle v. *New Castle County School District*, 642 F.2d 687 (3rd Cir. 1981), *aff'g* 489 F.Supp. 169 (D. Del. 1980)

Rollison v. *Biggs*, 567 F.Supp. 964 (D. Del. 1983)
Hark v. *The School District of Philadelphia*, 505 F.Supp. 727 (E.D. Penn. 1980)
Eberle v. *Board of Public Education of the School District of Pittsburgh, Pennsylvania*, 444 F.Supp. 41 (D. Penn. 1977), *aff'd* 582 F.2d 1274 (3rd Cir. 1978).

FOURTH CIRCUIT

Hessler v. *State Board of Education of Maryland*, 700 F.2d 134 (4th Cir. 1983)

Rowe v. *Henry County School Board*, 718 F.2d 115 (4th Cir. 1983)

Stemple v. *Board of Education of Prince George's County*, 464 F.Supp. 258 (D. Maryland 1979), *aff'd* 623 F.2d 893 (4th Cir. 1980)

Bales v. *Clarke*, 523 F.Supp. 1366 (E.D. Va. 1981)

Hines v. *Pitt County Board of Education*, 497 F.Supp. 403 (E.D. N.C., 1980)

Kruse v. *Campbell*, 431 F.Supp. 180 (E.D. Va. 1977)

FIFTH CIRCUIT

Scokin v. *State of Texas*, 723 F.2d 432 (5th Cir. 1984)

Marvin H. v. *Austin Independent School District*, 714 F.2d 1348 (5th Cir. 1983)

Stacey v. *Pasadena Independent School District*, 695 F.2d 949 (5th Cir. 1983)

David H. v. *Spring Branch Independent School District*, 569 F.Supp. 1324 (S.D. Tex. 1983)

Ruth Anne M. v. *Alvin Independent School District*, 532 F.Supp. 460 (S.D. Tex. 1982)

Gladys I. v. *Pearland Independent School District*, 520 F.Supp. 869 (S.D. Tex. 1981)

Howard S. v. *Friendswood Independent School District*, 454 F.Supp. 634 (S.D. Tex. 1978)

SIXTH CIRCUIT

Rettig v. *Kent City School District*, 539 F.Supp. 768 (N.D. Ohio, E.D., 1982) *aff'd in part, vacated in part* 720 F.2d 463 (6th Cir. 1983), *cert. denied* 104 S.Ct. 2379 (1984)

Sanders v. *Marquette Public Schools*, 561 F.Supp. 1361 (W.D. Mich. N.D. 1983)
Mitchell v. *Walter*, 538 F.Supp. 1111 (S.D. Ohio E.D. 1982)

SEVENTH CIRCUIT

Anderson v. *Thompson*, 495 F.Supp. 1256 (E.D. Wisconsin 1980), *aff'd* 658 F.2d 1205 (7th Cir. 1981)

Daniel B. v. *Wisconsin Department of Public Instruction*, 581 F.Supp. 585 (E.D. Wis. 1984)
John A. v. *Gill*, 565 F.Supp. 372 (N.D. Ill. E.D. 1983)
William S. v. *Gill*, 536 F.Supp. 505 (N.D. Ill. E.D. 1982) *reh'd* 572 F.Supp. 509 (N.D. Ill. E.D. 1983)
Mark R. v. *Board of Education, Bremen Community High School District*, 546 F.Supp. 1027 (N.D. Ill. E.D. 1982), *aff'd* 705 F.2d 462 (7th Cir., 1983)

EIGHTH CIRCUIT

Monahan v. *Nebraska*, 687 F.2d 1164 (8th Cir. 1982) *aff'g in part, vac'g in part* 530 F.Supp. 295 (D. Neb. 1981), *same case* 645 F.2d 592 (8th Cir. 1981) *aff'g in part, vac'g in part* 491 F.Supp. 1074 (D. Neb. 1980)

Cothern v. *Mallory*, 565 F.Supp. 701 (W.D. Mo. C.D. 1983)

NINTH CIRCUIT

Department of Education, State of Hawaii v. *Katherine D.*, 531 F.Supp. 517 (D. Hawaii 1982) *aff'd in part, rev'd in part* 727 F.2d 809 (9th Cir. 1983)
Mountain View-Los Altos Union High School District v. *Sharron B.H.*, 709 F.2d 28 (9th Cir. 1983)

Department of Education v. *Valenzuela*, 524 F.Supp. 261 (D. Hawaii, 1981)
Boxall v. *Sequoia Union High School District*, 464 F.Supp. 1104 (N.D. Cal. 1979)

TENTH CIRCUIT

Cain v. *Yukon Public Schools*, 556 F.Supp. 605 (W.D. Okl. 1983)

ELEVENTH CIRCUIT

Christopher N. v. *McDaniel*, 569 F.Supp. 291 (N.D. Ga. 1983)

DISTRICT OF COLUMBIA CIRCUIT

Parker v. *District of Columbia*, 588 F.Supp. 518 (D.C. D.C. 1983)
Jacobsen v. *District of Columbia Board of Education*, 564 F.Supp. 166 (D.C. D.C. 1983)
McKenzie v. *Jefferson*, 566 F.Supp. 404 (D.C. D.C. 1983)
Davis v. *District of Columbia Board of Education*, 522 F.Supp. 1102 (D.C. D.C. 1981) *reh. den.*, 530 F.Supp. 1215 (D.C. D.C. 1982)
Foster v. *District of Columbia Board of Education*, 523 F.Supp. 1142 (D.C. D.C. 1981)
Cox v. *Brown*, 498 F.Supp. 823 (D.C. D.C. 1980)

CALIFORNIA

Byrnes v. *Riles*, 157 Cal. App. 3d 1176 (4th Dist., 1984)
Newport-Mesa Unified School District of Orange County v. *Hubert*, 132 Cal. App. 3d 724 (4th Dist., 1982)
San Francisco Unified School District v. *State*, 131 Cal. App. 3d 54 (1st Dist., 1982)

DISTRICT OF COLUMBIA

Matter of J.A.G., D.C. App., 443 A.2d 13 (1982)

ILLINOIS

In re Walker, 107 Ill. App. 3d 1053 (1982)

IOWA

Buchwoltz v. *Iowa Department of Public Instruction*, 315 N.W. 2d 789 (Iowa, 1982)

MARYLAND

Breedon v. *Maryland State Department of Education*, 45 Md. App. 73 (1980)

MASSACHUSETTS

School Committee of Brookline v. *Bureau of Special Education Appeals*, 389 Mass. 705 (1983)

School Committee of Franklin v. *Commission of Education*, 17 Mass App. Ct. 683 (1984)

Isgur v. *School Committee of Newton*, 9 Mass. App. Ct. 290 (1980)

NEBRASKA

Adams Central School District v. *Deist*, 214 Neb. 357 (1983), *cert. den.* 104 S.C. 239 (1984)

NEW HAMPSHIRE

Petition of Darlene W., 469 A. 2d 1307 (N.H. 1983)

NEW YORK

Matter of J.F., 91 Misc. 2d 445 (1977)

NORTH CAROLINA

Harrell v. *Wilson County Schools*, 58 N.C.A. 260 (1982)

OREGON

Mahoney v. *Administrative School District*, Or. App., 601 826 (1979)